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JAN 13 1955
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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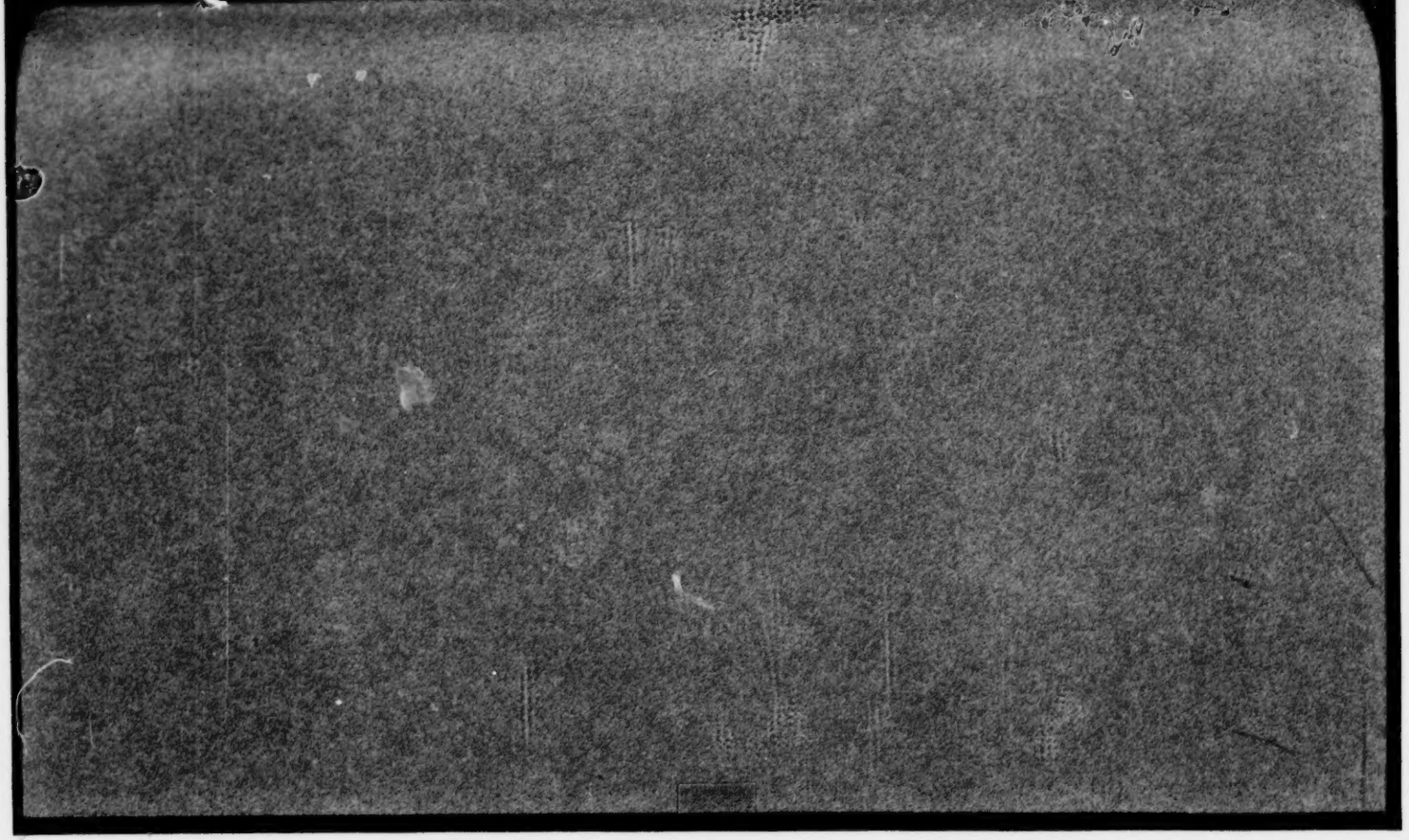

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LOUIS E. WOLCHER, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 28, 1954.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 218 F. 2d 505, and is printed in Appendix A.

The opinion of the Court of Appeals in an earlier phase, reversing a conviction on the same indictment and remanding for a new trial, is reported in 200 F. 2d 493, and is printed in Appendix B.

No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1954, R. 511. Rehearing was denied

on March 16, 1955, R. 513. An order dated April 9, 1955, signed by Mr. Justice Douglas, extended the time for filing petition for a writ of certiorari to and including May 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

On a trial for income tax evasion, the Government proved and petitioner Wolcher admits that in 1943 he received prices over legal ceilings for whisky. His defense is that he had to pay over-ceiling prices on his purchases and realized no net income on the transaction.

The critical testimony is Wolcher's statements that he paid for the whisky by ceiling payments to the shipper, and by over-ceiling payments to one Gersh, his contact in arranging the purchases. He testified that in addition to certain payments made to Gersh by check he sent large sums of cash to Gersh, by mail and express, without receipts or records.

At a previous trial the Government presented Gersh as a rebuttal witness. Gersh admitted receipt from Wolcher not only of some moneys paid by check but also of certain large sums sent by Wolcher to Gersh in cash. These cash receipts were identified as deposits on Gersh's Corn Exchange Bank bank records (i.e. the bank records of the "Cash Box", a trade magazine published by Gersh). These bank records were introduced as exhibits by the Government and also made available to the defense for exhibits.

Gersh contended he had been given the cash money to purchase pinball machines and phonographs, that pinball machines could not be acquired unless the purchaser was armed with the full cash payment in advance; that he had been unable to make purchases as requested and had therefore promptly returned to Wolcher in cash each of the shipments of cash funds which had been received from Wolcher, except in the last instance when he had been able to purchase ten phonographs for Wolcher. The trial court

excluded Wolcher's rebuttal documentary evidence showing that pinball machines were not then in short supply requiring cash payment in advance of shipment, and that Gersh had not in fact arranged the purchase of the phonographs. The Court of Appeals reversed and remanded, in part because of the actions of the trial court in excluding that documentary evidence. *Wolcher* v. *United States*, 200 F. 2d 493, Appendix B.

On the second trial, the Government subpenaed Gersh, but released him, without notice to petitioner, before defense completed its case. The prosecuting attorney frustrated the efforts of defense counsel to identify and introduce Gersh's bank statements which had been exhibits at the previous trial. The prosecuting attorney urged that there was no materiality in the records of a stranger to the trial. The Treasury Agent in charge of the investigation, who had attended the first trial, professed he had not seen these bank statements in the course of either the investigation or the first trial, and the prosecuting attorney professed that he had no knowledge of these exhibits or of any part of the first trial. That these statements were lacking in candor is shown below.

Defense counsel was thus unable to identify the corroboratory bank statements and perforce rested his case. The Government rested its case forthwith, although it had previously stated it would have rebuttal. A short recess from 10:30 a.m. to 1 p.m. was called to enable counsel to prepare argument to the jury. As the first order of business after resting of the case, defense counsel advised the trial court that he had just learned that Gersh was actually in San Francisco. The prosecuting attorney stated that Gersh had been notified that he was not to appear but that nonetheless he was in town. Defense counsel asked that the case be reopened to provide an opportunity to produce Gersh and thus identify the Gersh bank records. This was denied on the ground that the application was not timely, and that defense counsel could have subpenaed Gersh before. Defense counsel stated that he had not

anticipated the prosecution's tactics circumventing indentification of the bank records.

The prosecuting attorney presented the case to the jury on the ground that petitioner's story of shipments of large sums of cash to Gersh was unsupported and fabricated. This was done notwithstanding the fact that Wolcher's testimony in this respect had been corroborated at the first trial not only by Gersh's oral testimony but by the documentary bank records.

In the light of the foregoing facts and tactics, and viewing the following questions both singly and cumulatively, the questions presented are:

1. Was there grievous misconduct on the part of the prosecution, and a failure to comply with the Government's obligations in regard to evidence in its control corroborating the accused taxpayer in a vital respect,—

(a) In the prosecuting attorney's presentation to the jury on the ground that petitioner's testimony of cash shipments to Gersh was unsupported and fabricated when that fact had been established at the first trial by Government witness Gersh and his bank records.

(b) In frustrating defense counsel's efforts to identify the corroborating bank records, by the foregoing testimony by the revenue agent in charge of the investigation, objections and statement as counsel by the prosecuting attorney, all lacking in candor, and relating to matters they both knew and were chargeable with knowing.

(c) In the prosecution's tactics to circumvent the presentation of Gersh or his bank records at the second trial: by subpenaing Gersh and releasing him from subpena, without notice to defendant, while defense was putting on its case, by failing to call Gersh in rebuttal as at the first trial, and by objecting to

defense counsel's effort to reopen the case to call Gersh to identify his bank records.

2. Was there prejudicial failure to exercise sound discretion in the interest of justice when the trial judge (a) denied the application of defense counsel to reopen the case in order to provide an opportunity to produce Gersh to identify the vital bank documents, the application having been made prior to the opening to the jury, and promptly after defense learned that Gersh was in fact in town; and (b) thus penalized petitioner because of defense counsel's failure to anticipate the prosecution's tactics described above.

3. Was there prejudicial error in the charge in making the verdict turn on the jury's belief *vel non* in defendant's testimony, and in effect instructing the jury to convict unless they believed in defendant's testimony.

STATUTE INVOLVED

26 U.S.C. sec. 145(b), Internal Revenue Code, sec. 145(b) (as in effect prior to the Internal Revenue Code of 1954) reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to the penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

STATEMENT

1. Background as Referred to by Court Below

As the court below noted (R. 504) the background of the case is developed in its earlier opinion (Appendix B) and may be succinctly stated by quoting an excerpt from that opinion:

> "The appellant was convicted under an indictment charging that he wilfully and knowingly attempted to evade and defeat some $30,000 of the income and victory taxes due and owing by him for the fiscal year ending June 30, 1944, in violation of sec. 145b of the Internal Revenue Code * * *
>
> "The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whisky from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above described were) except for an item of $3,000 profit made on a transaction not involved here.
>
> "Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called "The Cash Box" devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these

remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person.

"Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance o tfhe full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

2. Government's Witnesses at Second Trial

The Government's proof of understated income in this case consisted of testimony that over-ceiling payments for whisky were made direct to Wolcher himself or were made to other persons who passed the money on to Wolcher.

Some 5,000 cases of liquor were involved, which petitioner received from three San Francisco licensed liquor wholesalers. The great bulk of the whisky was sent in six shipments from the East Coast to two of these wholesalers: George Barton Co. and Franciscan Distributing Co. There was also a seventh shipment through Rathjen Bros.

Attention is called to portions of the testimony of the Government's witnesses which indicated that the liquor in question had been obtained by petitioner through over-ceiling payments.

Thus, Samuel Weiss (of Franciscan) testified: In 1943 Wolcher had a few taverns we supplied with liquor. He asked for more whisky, and I told him it was impossible since sources of whisky for distributors were drying up, and that if he wanted more whisky he would have to get it and we would handle the importing as an authorized wholesaler at $2 a case. Wolcher said he could make a few connections in the East through people in the same busi-

ness, and he made arrangements for shipments to our firms from eastern distilleries (R. 122ff, 140-142).

James Oligny testified that in 1943 it was impossible even for wholesalers like his firm, George Barton Co., to get supplies from usual distiller sources. However, Cy Owens made an arrangement for liquor to be shipped to Bartons from the East, and the wholesaler's permitted margin was divided three ways between Barton, Owens and petitioner (R. 100ff).

Owens testified that he owned two taverns together with relatives of petitioner, that whisky was hard to get but petitioner said he had a friend who could get some (R. 75, 85). In the Bay Area whisky was not available except at over-ceiling prices (R. 85-6). Owens received payment from petitioner and transmitted it to George Barton Co. (R. 88). Deliveries were made at ceiling to Owens' bar and were made in part to bars owned by petitioner or his relatives. Owens had nothing to do with any other purchasers (R. 80ff).

Other purchasers, tavern operators, testified they paid over-ceiling prices. Thus Fred Rocci and Pete Cavigla testified they paid $60 a case to one Roy Clemens, the retail ceiling price (slightly in excess of $30) by check and the balance in cash. They had Clemens' pinball machines on location in their taverns. They threatened to switch their machine business from Clemens to a competitor who was offering black market whisky at $60 a case unless Clemens could provide liquor necessary to keep the taverns in operation. (R. 157-166, 210-216.) Clemens testified he went to petitioner from whom he purchased machines and said he needed whisky for survival of his machine business. Petitioner said he would see what he could do. Two months later petitioner said he knew where whisky was available, that Clemens and his customers would have to pay black market prices, and that petitioner wasn't making a dime out of it (R. 291-4). In other cases the arrangements were made with petitioner by Pete Norman

and John Kirby, who had long purchased their machines from petitioner (R. 195ff, 268ff).

About 10 per cent of the whisky involved in this case, 500 cases of Old Brook, was sold by Rathjen Bros. to the "Gold Coast" (a tavern owned by Wolcher) allegedly for $25,950 (Hammerly, R. 46). Xavier Grusenmeyer who testified as to some cases sold for cash over-ceiling, said that petitioner told him this was because he had to pay money over the ceiling price to get the whisky (R. 68). Vance Hammerly, auditor for Rathjen's, testified that the company was so short of liquor that it instituted allotments of whisky among its 5000 customers in accordance with previous purchase volumes (R. 311), that however, that was not done in the case of these 500 cases sold to Gold Coast (R. 315), that this whisky was high-priced, and that these were not handled by Rathjen's general commission salesmen but by a house salesman, Ray Worthy (R. 317).[1]

3. Evidence of Defendant

Defendant Wolcher testified: I did not report the overage I received on sales of whisky on my income tax return because the overages I received were approximately equal to overages which I had to pay (R. 366).[2] (Petitioner reported income of $66,900. The Government contends his income was $102,000. R. 25.)

In 1943 I made efforts to get whisky for the taverns belonging to me and my relatives, that was my original motivating thought, and it spread into helping out customers

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[1] Rathjen's ledger sheets (Deft's. Exh. C and D) show that for months before and after this sale to the Gold Coast in May, 1943, the largest sale by Rathjen for any month to either Gold Coast or Silver Rail Taverns never exceeded $600 in round numbers. In contrast here was a sale for $25,950.

[2] The overages paid out by Wolcher applied to 5000 cases of whisky. Approximately 1500 cases were resold, to taverns owned by Wolcher, his relatives and a few friends, at retail ceiling. The balance was sold to outsiders at overceiling prices (R. 410-411).

and friends (R. 409, 418). Later, when I saw how this was expanding into friends of friends and large volumes, I stopped it (R. 411). In my efforts to get whisky for our bars, I contacted wholesalers, advertised in the papers (Deft. Exh. E), but all without success (R. 385-397). I acquired whisky by paying over-ceiling prices, the same whisky I sold at prices over-ceiling. Clemens, Norman and Kirby were customers of mine in the coin-operated machine business (R. 348). That includes cigarette vending, gun vending, pinball, phonograph, etc., machines and slot machines until their possession became illegal (R. 345).

For the purpose of acquiring whisky from the East, I contacted Williams Gersh, who published a coin machine paper (R. 353-4). I first had a talk with Gersh about whisky in the spring of 1943 (R. 355).[3] As a result I sent Gersh during 1943-1944 close to $150,000. I sent him $5000 in June 1943 for use in making the payment that the whisky cost over and above its regular invoice price (R. 358). As a result the first shipment of whisky arrived from the East through Franciscan Co. (R. 359).

I sent the money to Gersh in various ways: I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360).

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whisky (R. 361).

$5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft's Exh. E, R. 370) and purchased a bank draft which I sent him (R. 363).

$3,300 cash in the middle of August 1943 (R. 359).

$5,000 at the end of August 1943, in cash by mail (R. 461).

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[3] Wolcher was asked what conversation he had with Gersh. The Government's objection was sustained (R. 355-6).

$12,500 by cashier's check dated September 29, 1943 (Deft's Exh. I), which I purchased for cash (R. 378-9).

$60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November, 1943 (R. 360-361); Deft's Exs. F, R. 371-2).

$30,000 cash by express in December or January 1944 (R. 362).

$3,000 which I gave Gersh in New York in 1944 for the purpose of winding up our transactions (R. 367-8).

And there were a number of mailings of $1,000, $12,000, $1,500 apice, mailed to Gersh (R. 404).

In my first arrangement with Gersh I was to pay him $20 a case overage above ceiling. Then he increased it to $25 a case (R. 361-2).[4] The cash I sent Gersh I got from the sale of the whisky (R. 364).

During this period I received money back from Gersh in accordance with our understanding for those instances when I sent him money by check. I entered the original $5000 on my books as a suspense item, Bill Gersh. When he returned the $5000 check we put it in the bank account and cancelled the entry (R. 364). In November 1943 I didn't have enough over-ceiling money to send the required cash and I borrowed $30,000 to pay him by bank draft. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380).

I received back from Gersh approximately $35,000—never by cash. I received a check for $5,000 dated August 13, 1943 (Deft. Exh. G, R. 374); a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375); a check for $2,000 received from his wife (R. 379; Deft. Exh. J. R.

[4] There is no dispute that if petitioner had to pay an overage of $20-$25 a case for whisky, he made no profit on the whisky transactions.

383). And at my suggestion Gersh paid a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased (R. 376-7).

Petitioner testified that he kept no books as such on these transactions and only a brief memorandum record at that time (R. 382). Upon cross-examination it was brought out that except for the checks Wolcher had no record of the money sent to Gersh. Mail was sent not registered (R. 404), money sent express was insured for a nominal sum, was not described as money and no receipt was obtained (R. 403). Petitioner's record at that time was in the form of a simple pocket memo of how much was owing as of the time of any shipment, and he disposed of the earlier memo so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439). The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whisky transaction (R. 405).

As to the purchase from Rathjen Bros., Jack Kent, who then managed Gold Coast cafe, testified (R. 335-7) that when he asked Ray Worthy, salesman for Rathjen's, for additional stock Worthy told him there were 500 cases available of Old Brook, a new bonded whisky, if an additional price were paid under the table; that he put Worthy in touch with petitioner. Kent was led to understand the excess price was $20 a case, but Worthy didn't say that in so many words and Kent didn't negotiate with Worthy (R. 338). Petitioner testified that he made an over-ceiling payment of $10,000 cash to Worthy (R. 349).

4. Tactics and Rulings Frustrating Presentation by Defense of Evidence of Receipt of Cash by Gersh

At the second trial the Government took the following steps to circumvent the presentation of evidence of receipt of cash by Gersh. The Government subpoenaed Gersh as a witness, but rested its case without calling him in rebuttal:

a. Defense counsel (Mr. Friedman) called Richard Appling, the special agent in charge of the investigation of petitioner's tax return, and asked whether he had occasion to procure a copy of Gersh's bank account. Mr. Schnacke, the prosecuting attorney, objected on ground of lack of materiality in the bank account of a stranger (R. 464). The court permitted the question for the time being. Appling answered he did not procure that account during the course of his investigation (R. 465). Mr. Friedman asked Appling to identify the document which was Government's Exhibit 37 at the first trial (later marked Deft's. Exhibit O for identification, R. 472). Appling answered he had never seen it before the first trial, he saw it after the conclusion of the first trial (R. 466). Defense counsel then asked whether photostats of that document were not procured in the course of the investigation under Appling's charge. Mr. Schnacke's objection was sustained (R. 466).

b. Defense counsel then asked Mr. Schnacke to take the stand so that he could ask him about these bank account records. Mr. Schnacke said he would be "tickled" to take the stand but added (R. 467):

> "Mr. Schnacke: I don't have any knowledge of those. I wasn't here at the first trial. I don't know anything about it, about any part of it.
> "Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you." (R. 407)

c. Defense counsel rested and the Government rested forthwith without calling any rebuttal witnesses. The previous trial day (Thursday) the prosecuting attorney informed the court that he had witnesses in rebuttal, who were all noticed for Monday, and the court recessed until Monday (R. 457-8). When the Government rested, the court recessed from 10:30 a.m. to 1 p.m. when counsel were to begin argument to the jury. Mr. Friedman stated that in the interim he had been advised that Gersh was in fact in San Francisco, that if so he would be the best witness

to identify the bank accounts, that these bank documents were of vital interest, and asked that the case be reopened so that defense would have an opportunity to produce him (R. 468-9). Mr. Schnacke stated that Gersh had been subpoenaed by the Government, but that on the previous Friday, August 28, Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." Mr. Schnacke said he had determined this by means of investigation and that Gersh had not been in touch with the Government (R. 468-9).

The court agreed that the matter was material but denied defense counsel's application to reopen the case as not timely, stating that the case had been adjourned at 10:30 a.m. to allow counsel to prepare argument, that the case was now ready to go to argument. (R. 470-3.)

d. Mr. Friedman asked Mr. Schnacke to stipulate that the exhibits were the bank records of Gersh, having been introduced and identified as such by the Government at the last trial (R. 470). Mr. Schnacke stated he did not see any connection with the case, and that defense counsel could have subpoenaed Gersh. Mr. Friedman stated (R. 471) "I didn't think we would have any difficulty in establishing these documents in view of the fact that they are their documents, because the record shows that the Government examined Mr. Gersh." (R. 471) The court repeated that defense application regarding Gersh was not timely (R. 472-3). The Gersh bank statements were marked defendant's Exhibits O and P for identification.[5]

While reserving for later the argument as to the significance of these objections and rulings, it is appropriate

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[5] The record in No. 12992 shows that these were the Corn Exchange Bank ledger sheets of the account of the "Cash Box", a coin machine trade magazine published by Gersh (Record 12992, p. 558) which were brought into the case by the Government, as Government Exhibit 37; the balance was supplied to the defense for introduction as Defense Exhibit C (Record No. 12992, pp. 563, 585). These references to Record No. 12992 are set forth in Appendix C below.

to refer briefly to the significance of the evidence involved.

As is noted in the opinion in *Wolcher* v. *United States*, 200 F.2d 493, Appendix B, Gersh admitted receiving $85,000 from petitioner Wolcher, part by check,[6] and part in cash. Gersh's admission as to the receipt of substantial sums of cash were not only a matter of his oral testimony, but were established by his corroborating bank account records, as appears from the record at the first trial, which is before this Court.[7]

Thus that bank record provides documentary corroboration of the $3,300 cash receipt deposited August 11, 1943; the next $5,000 cash receipt, deposited August 31, 1943; the large receipt of $30,000 cash, deposited January 4,

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[6] Petitioner's payments by check were shown in Defendant's Exhibits E, F and I (R. 370-2, 378-9).

[7] Record No. 12992, U.S. Court of Appeals for the Ninth Circuit, has been duly certified by the Clerk of that Court and lodged with the Clerk of the United States Supreme Court.

That record is properly the subject of judicial notice in this proceeding. *Wells* v. *United States*, 318 U.S. 257, 260; *Alexander* v. *Hillman*, 296 U.S. 222, 231; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 336.

It may be noted that the record in the first trial was referred to by the Government below and by the court of appeals to reject petitioner's claim of error in the ruling (R. 355) excluding his testimony of his conversation with Gersh.

The Government brief below, quoted from the record in the first trial (as to Wolcher's conversation with Gersh) to show that the record at the second trial in fact contained the substance of that conversation, and therefore the ruling excluding testimony as to that conversation (R. 355) was not prejudicial. (Brief, p. 22). The Court of Appeals affirmed, stating that since the substance of the conversation was in fact related by Wolcher there was no prejudice in the ruling (R. 509, Appx. A, p. 6a)

In regard to certain other matters, the Government brief below quoted from the first record (pp. 8-9); (and see footnote 4), and even referred on two points (pp. 6, 31) to Wolcher's brief on appeal from the first conviction. A certified copy of the Government's brief below is on file with the Clerk of the Supreme Court.

1944.[8] Gersh testified as to these, stating that Wolcher usually sent the money in cash, but claimed that he sent it back the way he had received it—by airmail, not registered.[9] The evidence at the first trial further shows that Gersh gave testimony as to these cash receipts from Wolcher to the revenue agents investigating the Wolcher case. In examining Gersh they called upon him to explain his deposits in the Cash Box bank account.[10]

5. The Charge to the Jury

The trial judge charged that the Government's case in essence was that petitioner's contention of sending large amounts in cash through the mail was fabricated and should not be believed (R. 483), that the issue is whether the jury did or did not believe the testimony and the story told by defendant (R. 483). He stressed that the jury could take into account the factors of the illegality of the transactions and the failure to keep books and records (R. 484).

6. Conviction and Recommendation of Leniency

The jury found defendant guilty, but recommended leniency (R. 6). The judge had made no reference to leniency recommendations in his charge and stated only that the matter of punishment is served exclusively for the judge (R. 476). Judgment was for two years' imprisonment and $10,000 fine (R. 19).

7. Appellate Proceedings

The court of appeals affirmed the conviction (R. 511), holding that the refusal of the district court to reopen the trial was within its discretionary authority, and that the

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[8] Record No. 12992, U. S. Court of Appeals for the Ninth Circuit, pp. 586-593, Appendix C, pp. 28a-33a.

[9] Record No. 12992, pp. 601-605, Appendix C, pp. 35a-37a.

[10] Record No. 12992, pp. 629-636, Appendix C, pp. 41a-44a.

charge, taken as a whole, did not err in failing to place on the Government its full burden of proof (R. 504ff).

Upon petition for rehearing, by leave of court, counsel for petitioner filed a separate supplementary statement. A certified copy is on file with the clerk. It was exclusively directed to the contention that the trial tactics of Government counsel constituted misconduct, which point had not previously been presented.

In its order denying rehearing, the court of appeals recited that its order was on consideration of the petition for rehearing and of the supplementary statement in support thereof. No opinion accompanied the order (R. 513).

REASONS FOR GRANTING THE WRIT

1. This is one of the infrequent criminal cases meriting review on certiorari. In terms of the conventional criteria for certiorari, we shall point out that the rulings below are contrary to the opinions of other circuit courts of appeals and in disregard of applicable decisions of this Court. But this petition rests on a broader base, and the entire case should be reviewed. It presents important questions of the administration of justice in criminal cases.

This petition presents several questions which cluster around a single core of injustice—that the prosecution sought and obtained a conviction on the basis that petitioner's testimony as to a critical fact (that he sent large sums of cash to one Gersh) was fabricated out of whole cloth, when the fact that such cash shipments were made was established by the Government's files and the record at the previous trial: petitioner's testimony was corroborated not only by Gersh, the Government's own witness at the earlier trial, but also by Gersh's bank records, documents of the highest integrity.

This Court should grant certiorari not only to review the departures from the accepted and normal course of proceedings detailed below and to correct the serious injustice in this case, but to speak out clearly on the im-

portant question of the Government's duty of fair dealing in criminal cases.

In *Holland* v. *United States*, 348 U.S. 121, decided December 6, 1954, this Court set forth the prosecution's duty to investigate taxpayer's explanations in "net worth" cases. This Court should now set forth the prosecution's underlying responsibility, which applies in all criminal cases, concerning the evidence obtained by the Government which corroborates taxpayer's account in a significant respect. The Government cannot be free to ignore such evidence, to deny knowledge of its existence, or to circumvent its introduction in the record.

Not only to correct the injustice to petitioner, but also to assure that future proceedings are properly conducted, it is important for this Court to enunciate with force and clarity the basic principles governing corroborative evidence. There is need for this Court to provide a beacon pointing to the prosecution's straight path of assisting in the presentation of a full record,—that justice shall be done. In this case the prosecuting attorney turned aside from that path. He not only failed to put before the jury evidence in the Government's possession corroborating the fact that petitioner sent cash to Gersh, he took steps calculated to keep that evidence out of the record. And he nailed down the conviction by the gross misconduct of assailing petitioner's testimony on this vital point (which the jury did not know was corroborated) as a mere fabrication.

Instead of illuminating the case by assisting in presentation of the full record, the prosecuting attorney beclouded and distorted the case. This established the conditions conducive to the trial judge's prejudicial rulings,—the refusal to reopen the case to permit petitioner to present the corroborative bank records, and a charge which induced the jury to convict if they did not believe defendant's apparently uncorroborated testimony.

The prosecution and the courts below sought to uphold their actions and rulings on the ground that defense coun-

sel could have protected his client. In effect they scored defense counsel for failing to anticipate the prosecution's unfair tactics.

For convenience, the questions arising out of the several occurrences at the trial are treated in separate paragraphs of this petition. Each of the prosecution tactics and judicial rulings complained of represents serious error. But attention is particularly called to their formidable cumulative impact on the jury, for they were all knit together into a single result,—that the jury convicted because it did not believe petitioner's (seemingly unsupported) testimony of cash shipments to Gersh.

The jury recommended leniency. There was no instruction that such a recommendation was permissible. The law makes no provision therefor. This leniency recommendation shows forcefully that the jury was uneasy in its verdict, and that the offensive tactics and erroneous rulings were highly prejudicial.

2. Consideration of the issues requires a capsule recapitulation of the basic facts and the posture of the case. Petitioner was convicted of wilfully attempting to evade income taxes. He admittedly received payments above OPA ceilings on certain sales of liquor. Petitioner's defense is that he realized no net income because he had to make equivalent payments above ceiling to purchase the liquor. (Petitioner testified that he was not in the business of selling liquor at wholesale, and that he bought the liquor over-ceiling in order to assure a supply for taverns owned by himself and relatives, and for taverns whose continuance was important to petitioner's customers in the coin machine business.)

Petitioner testified as to large over-ceiling payments made to William P. Gersh, and that these payments had been made partly by check but mostly by cash. He stated his definitive recollection of particular large shipments of cash by mail and express, without registration of mail or any other records or receipts,—of $3,300 in mid-August,

1943; of $5,000 in late August; of $30,000 in December or January, 1944. (See pp. 10-11 above)[11]

The record at the first trial is before this Court.[12] The evidence at the first trial showed that Wolcher had sent large sums of cash to Gersh that way. Government witness Gersh corroborated that Wolcher usually mailed or sent him money by cash in ordinary envelopes, without receipt or registration. These cash transfers were verified by the records of deposits in Gersh's "Cash Box" (trade magazine) account in the Corn Exchange Bank. At the first trial that bank record was brought into the case by the Government as Government Exhibit 37, and the balance was supplied to the defense for introduction, as Defendant's Exhibit G. It provided documentary corroboration of petitioner's account, as indicated by the following:

Petitioner's testimony of cash shipments to Gersh. Record No. 14109. (See pp. 10-11 above).	*Gersh's bank account record of cash deposits. Record No. 12992. (See Appendix C, pp. 27a-29a).*
$ 3,300—mid-August 1943	$ 3,300 deposited Aug. 11, 1943
5,000—late August 1943	5,000 deposited Aug. 31, 1943
30,000—December 1943 or January 1944	30,000 deposited Jan. 4, 1944

Gersh only corroborated petitioner on the fact of large cash transmissions, and on that fact he was compelled by his own bank records. Admitting the receipt of cash was contrary to his own interest, and led him to try to show that such large cash transfers resulted in no income to him. Essentially therefore he was hostile to petitioner. His explanation was that he had received moneys from petitioner in order to obtain phonographs and coin machines which he testified were so scarce that they required full cash payment in advance. In rejoinder, petitioner

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[11] He also testified as to two personal deliveries of cash to Gersh of $30,000 and of $3,000, and of a number of mailings of smaller sums, (p. 11 above).

[12] See footnote 7 above.

offered documentary evidence, trade magazines to prove that coin machines were freely offered and easily purchased without the need for advance cash, and correspondence to refute Gersh's assertion that he had arranged phonograph purchases for petitioner. These offers were opposed by Government counsel. The rulings of exclusion were reversed in *Wolcher* v. *United States*, 200 F.2d 493 (see Appendix B, pp. 7a, 15a):

> "We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted."

A. Prosecution's Misconduct

3. At the opening of the second trial the prosecution knew that if the jury were presented with the real issue,—*why* was the cash sent to Gersh—the complete evidence would now include the documentary evidence discrediting Gersh's explanation which had been excluded at the first trial.

And so at the second trial the Government obtained its conviction by presenting the case to the jury not on the real issue but on a spurious one, *whether* cash was sent to Gersh.

As summarized by the judge in the charge (R. 483):

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."[13]

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[13] Prosecuting attorney's exact words to the jury were as follows (p. 25 of reporter's certified transcript on file with the Clerk):

"And then we come to these fantastic shipments of money to the east. We have only Mr. Wolcher's unsupported word for any amounts of cash that were shipped east. And examining those, I think we ought to look at what a business man would do with

The tactic was telling. The jury apparently found it hard to believe that anyone would send large sums through the mail and by express without receipts. It is certainly not common experience. And of course the jury was unaware that petitioner had in fact been corroborated at the first trial by Government witness Gersh and by his bank records.

There is no difference in effect between a conviction obtained by spuriously challenging testimony as fabricated and a conviction obtained on the basis of fabricated testimony. Due process of law is denied when a conviction is obtained upon the basis of perjured testimony. The doctrine was first announced by this Court in *Mooney* v. *Holohan*, 294 U.S. 103, where the prosecutor knew the testimony was perjured. And it applies even though the prosecutor at the trial did not know the evidence was perjured but the fact is later brought to the attention of the Government. *Jones* v. *Kentucky*, 97 F.2d 335 (C.A. 6 Cir.); *Kelly* v. *Ragen*, 129 F. 2d 811, 814 (C.A. 7 Cir.).

But this case does not require a determination as to due process; there has been a complete failure to meet the standard of fair play applicable to federal prosecutors. *Berger* v. *United States*, 295 U.S. 78. In that case this Court denounced as prejudicial and reversible misconduct a prosecutor's action in presenting the case to the jury upon assumptions which he believed to be *true* but which were outside the record. It is far more serious to traduce as a fabrication testimony of the accused which the Government's files and a previou trial record show have been corroborated by documents of the highest integrity, identified by the Government's witness and vouched for by the Government itself at the earlier trial.

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amounts of cash of that sort. If there were any such amounts of cash sent, would they be sent in this fantastic fashion? $30,000, as I recall, bundled up in an express parcel and insured for a nominal amount. Case after case of a thousand, $1,500 stuffed into an envelope and sent by ordinary mail. I don't think that's a very persuasive story."

Even in a civil case "the fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up." *F. W. Woolworth Co.* v. *Wilson*, 74 F.2d 439, 442-3 (C.A. 5 Cir.).

The presentation to the jury in this case was prejudicial misconduct. See *Berger* v. *United States*, pointing out that improper assumptions by the prosecuting attorney carry disproportionate weight against the accused precisely because the jury has special confidence in the prosecuting attorney as an officer of the law pledged to vindication of the innocent as well as punishment of the guilty. See 295 U.S. 78, at 84.

While the prosecuting attorney "may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88. Here he "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense" (295 U.S. at 84). The Government's proper interest "in a criminal prosecution is not that it shall win a case but that justice shall be done." (295 U.S. at 88.)

Petitioner must now turn to this Court to assure that justice shall be done. The presentation to the jury was not separately assigned as error below. Yet with misconduct so gross, this Court should not hesitate to exercise its undoubted corrective jurisdiction, particularly since the injustice of the summation is part and parcel of the injustice wrought by the prosecution's trial tactics and the Court's ruling which forestalled the corroboration of petitioner by the bank records (see paragraphs 4-9).

4. The presentation to the jury was the capstone of earlier machinations meriting rebuke and reversal, tactics discussed in paragraphs 4-6.

(a) When defense counsel sought to identify the Gersh bank account record by questions to Treasury Agent Appling, the prosecuting attorney maneuvered to curtail defense questioning of Appling on the grounds that there was

no materiality in the bank account of a "stranger" to the trial (R. 464-6).

The prosecuting attorney knew better than anyone else just how material these bank records were. For he knew of his plan to attack defendant's apparently unsupported testimony as a fabrication. See Wharton's Criminal Procedure (10th ed.) sec. 1792, p. 2244:

> "Technical objections to competent evidence by prosecuting attorneys, is a 'trick' which has received merited rebuke at the hands of the courts; and compels reversal of judgment by the higher court.

(b) When Mr. Schnacke, the prosecuting attorney, was requested to identify the Gersh bank account records previously brought into the case by the Government, he said he would be "happy" to take the stand, indeed he would be "tickled" to do so, but he continued (R. 467):

> Mr. Schnacke: I don't have any knowledge of those [bank records]. I wasn't here at the first trial. I don't know anything about it, about any part of it.
>
> Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you.

The prosecuting attorney made a statement as counsel which blocked this effort of defense to identify the records. Even in the abstract, how is it possible to credit Mr. Schnacke's assertion that he had prepared a major criminal case for retrial without studying the record of the first trial. How is it possible to take seriously the suggestion that he decided to release the subpena governing Gersh, the Government's critical witness at the first trial, without having carefully studied Gersh's testimony and exhibits at the first trial.

But the point is clinched by the record in this case. For Mr. Schnacke's conduct of the trial clearly reflected his careful study of the earlier record. This is shown by various

instances set forth in the footnote.[14] Attention is particularly called to the way in which Mr. Schnacke cross-examined petitioner on the details of petitioner's endorsement of a $30,000 check to Gersh. Thus Mr. Schnacke asked such questions as these (R. 397-8):

> "Q. Well, actually, you were in the Corn Exchange Bank, weren't you?
>
> * * * * *
>
> "Q. And to accommodate you in cashing the check he signed the name 'Bill Gersh, The Cash Box', under it, didn't he?
>
> * * * * *

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[14] a. On the first day of the second trial defense counsel objected to the introduction of a photostat of the petitioner's tax return. He quoted (R. 39) from the Government's offer of the original tax return at the earlier trial, with permission to substitute a photostatic copy, as indicating that the Government had custody of the original. Mr. Schnacke called upon defense counsel to "show us in the record anywhere where that photostatic copy was introduced in substitute for the original return" (R. 40).

b. Mr. Schnacke read into the record (R. 268) as part of the Government's case the testimony of John Kirby at the first trial, Kirby having since died. He read one part of Kirby's earlier testimony (Record No. 12992, pp. 368-374), but eliminated another part (Record No. 12992, pp. 656-668) containing the questions which had been held objectionable on the first appeal. (Appendix B, infra.)

c. On cross-examination of Jack V. Kent, Mr. Schnacke indicated by his question (R. 343-4) that he knew that Old Brook whisky did not sell well in the Gold Coast cafe. That fact was later confirmed by petitioner Wolcher (R. 413-4), but at the time Mr. Schnacke asked the question his knowledge of the fact obviously came from the earlier record. (Record No. 12992, p. 435.)

d. On cross-examination of petitioner Wolcher, in addition to the matter stated in the text of this petition for certiorari, Mr. Schnacke asked (R. 406) (a) whether Wolcher had not run an advertisement in the Cash Box every week during the latter part of 1943; (b) whether Gersh had not paid for equipment received by Wolcher from Runyan Sales Co. These questions had no foundation in the second trial. They were the subject of testimony in the earlier trial. See Record No. 12992, as to (a) p. 760; as to (c) at pp. 533, 594-5.

"Q. Well, you were with him at the time, weren't you?

* * * * *

"Q. And didn't the proceeds received on this check go to you in cash?"

None of these details were indicated at the second trial. *They were all as set forth in the testimony of Gersh at the first trial,*[15]*—on the very page that Gersh's (Cash Box) bank account in the Corn Exchange Bank was identified and brought into the case as an exhibit (Exhibit 37) by the Government (Record No. 12992, p. 562).* The earlier record is before the Court; for convenience the cited references are set forth in Appendix C to the petition.

(c) Appling was the special agent in charge of the Wolcher investigation, lasting many months. He testified that he had no occasion to procure a copy of Gersh's "Cash Box" bank account during his investigation, that he could not identify Government Exhibit 37 at the earlier trial as anything he had seen either before or during the first trial. He was asked whether a photostat thereof was procured by his office in the course of the investigation under his charge. Upon the prosecutor's objection the question was excluded. (R. 464-466)

The right-hand man of the prosecution, Appling attended both trials and was obviously familiar with the entire documentary record. Again the transcript of the first trial clinches the point. Government's Exhibit 39 at the first trial was a statement given by Gersh to the Intelligence Unit on March 16, 1949, under questioning by Appling. And Appling asked Gersh as to the correctness of his answers in his previous statement to the Treasury agent concerning the cash receipts from petitioner and expenditures (R. No. 12992, p. 613, Appendix C, p. 40a).

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[15] Record No. 12992, pp. 560-562; Appendix C, infra, pp. 20a-22a. Wolcher gave contrary testimony, denying receipt of proceeds of the check (Record No. 12992, p. 473).

In the previous (1944) statement (Govt. Exh. 40 at the first trial) the Treasury agent had specifically questioned Gersh on the basis of his deposits as shown by the "Cash Box" account at the Corn Exchange Bank and had been advised that these represented cash funds received by Gersh from Wolcher in cash through the mails. (R. No. 12992, p. 629ff, Appendix C, p. 41aff.)

These tactics require reprimand and reversal. At the very least they reveal a lack of minimum candor required of the Government officials in charge of a prosecution. They are doubly meretricious since they not only resulted in excluding the evidence corroborating petitioner's testimony of cash payments to Gersh, but paved the way for the prosecuting attorney to argue to the jury that this testimony was a fabrication.

5. The transparent and clumsy statements of the prosecuting attorney and the revenue agent serve to point up two things: first, the overreaching in this case; second, the necessity for a clear statement by this Court of the Government's affirmative responsibility to acknowledge the existence of evidence in its files corroborating the taxpayer and to make that evidence available to the court.

In this case the prosecuting attorney professed ignorance of the actions of predecessors and the internal revenue agent in charge of an investigation was shielded from questions concerning the evidence developed during the investigation.

The Government necessarily acts through many agents and officers. But there is only one Government. The top officials at the trial—the attorney in charge, and the revenue agent in charge of the investigation—are chargeable with knowledge of the disclosures made to the Government. Otherwise injustice can be ensured by laziness or wilful blindness of the responsible Government officials. See *United States* v. *Ragen*, 86 F. Supp. 382 (N.D. Ill., 1949), where vital documentary evidence favorable to the accused was given to the police but ignored. The court stated "It

is manifest in this matter that some one identified with the prosecution . . . ignored a material piece of evidence", and held "the prosecution is charged with knowledge of what was contained in the certificate." (86 F. Supp. at p. 387.)

6. The prosecution's tactics in regard to Gersh as a witness were a denial of fair dealing which amounted to a suppression of evidence. In some cases suppression is achieved by more sophisticated tactics than others, but the effect is the same. In the clearest case, the prosecution spirits the witness away to a locked hotel room. It is also suppression if the prosecution knows of some real evidence but fails to make disclosure to the defense. *Griffin* v. *United States*, 183 F. 2d 990 (C.A.D.C.) And even in a case where the identity of the witness is clearly known to the defendant, who dealt with him in the transaction involved, it has been held suppression for the prosecution to fail to advise defendant of the witness' statement corroborating defendant in a material respect. *United States* v. *Rutkin*, 212 F. 2d. 641 (C.A. 3d Cir.)

The doctrine of suppression is more accurately a doctrine of appropriate dislosure and notice. When the prosecution has effective control over witnesses and evidence whose production would normally be anticipated, the course of fair dealing is for the prosecution to notify the defense before releasing or removing the witness. *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C.A. 9 Cir.); *United States* v. *Peterson*, 24 F. Supp. 470 (E.D. Pa.)

In the *Peterson* case Circuit Judge Maris (sitting as a district judge) affirmed a conviction for a counterfeiting violation. But he considered the problem of the prosecuting attorney's obligations. He rejected the contention that the prosecution was required to call eye-witnesses or co-conspirators. But in doing so he pointed out (p. 471):

> " . . . it is now sufficient if the prosecutor notifies the defendant of his determination not to call a particular witness who was present when the crime was committed."

In its brief below (p. 30) the Government sought to distinguish the *Sullivan* case on the ground that there the question was whether the prosecution had erred in revealing to the jury that the co-conspirators were available to the defense if desired as witnesses. But in upholding that action of the prosecutor, even in the presence of the jury, the court dramatically confirmed that such advice by the prosecution to defense counsel is the accepted course of proceeding. The court referred to this procedure as a "simple detail" which was "quite proper" (p. 994).

The prosecution's actions in regard to Gersh did not reflect fair dealing with defense counsel. They comprise an artful campaign to keep Gersh out of the court room. First the prosecution subpenaed Gersh, foreshadowing his appearance in rebuttal as at the first trial. At adjournment time on Thursday afternoon Mr. Schnacke advised the Court that he had rebuttal witnesses (R. 455), and that he had noticed his subpenas for Monday (R. 457). The Court called a recess from Thursday to Monday when the defense would conclude its case and the Government put on rebuttal. The next day, Friday, Mr. Schnacke advised Gersh of his release from the subpena (R. 468). No notice was given to defendant. Defense counsel later sought opportunity to produce Gersh to identify the bank records. With obvious irritation, if not dismay, at the prospect that Gersh might come into the court room, the prosecuting attorney stated that Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." (R. 469)

The Government's brief below (pp. 31-2) sought to support its actions on the ground that the defense could not complain it was hurt by Gersh's absence since it had vigorously attacked Gersh's testimony as false at the first trial. Petitioner denies Gersh's testimony as to why he received the cash. But petitioner never contested Gersh's testimony that he received the cash which stands on an entirely different plane; this was an admission contrary to Gersh's own interest and confirmed by the documentary bank records.

The Government also argued below (Brief, p. 31) that there was no "suppression" because Gersh's evidence had been given at the first trial and was known to petitioner. Is the Government suggesting that it had less responsibility at the second trial than at the first? On the contrary, the first trial is part of the background which sharpens the purpose and technique of the misconduct at the second trial. Fair dealing required the Government to advise the defendant that it was releasing Gersh from subpena and would not call Gersh in rebuttal, as it had done at the first trial. This is particularly true since petitioner was wronged at the first trial by being prevented from presenting to the jury the full (documentary) evidence relating to Gersh's explanation.

The underlying principle of fair play was indicated, in circumstances not too dissimilar, as long ago as *Anderson* v. *George*, 1 Burrows 352 (97 English Reports 349) (King's Bench 1757). The defendant bought goods and paid plaintiff with the note of one Hopley, which defendant endorsed. Plaintiff extended time for payment. When Hopley defaulted, the dispute arose whether plaintiff or defendant should bear the loss of this note. Plaintiff had the note in court but rested his case after proving the sale of the goods, a fact which was not in dispute. Defendant had failed to serve a notice to produce the note and was thus unable to prove it. Plaintiff obtained judgment for the value of the goods sold, but this was reversed on appeal. The court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience.

7. The point has been made that defense counsel could have subpenaed Gersh as a witness. In the first place, the critical need to call Gersh arose because the Government officials professed ignorance of the bank records. Defense counsel pointed out at the trial that he had not anticipated that difficulty (R. 471). Petitioner should not be penalized because defense counsel did not anticipate prosecution's pernicious tactics.

Defense counsel was entirely justified in seeking corroboration of the fact that petitioner sent cash to Gersh from the documentary bank records rather than by calling Gersh as a witness. Gersh was indeed the true witness against petitioner. In the spirit of the Sixth Amendment petitioner was entitled to be confronted by Gersh rather than be put under the necessity of calling him as a hostile witness.

In the second place, and as a separate matter, defense counsel anticipated and was led to anticipate that the prosecution would call Gersh as a rebuttal witness, as at the first trial. It was natural to presume that petitioner would be confronted by the real witness against him. And defense counsel was tricked by the prosecution's action subpenaing Gersh, announcing that it would call rebuttal witnesses (as at the first trial), and releasing Gersh from subpena without notice to petitioner.

Finally, it should be noted that the failure of the defense to subpena or call Gersh could not in any way justify either the prosecution's profession of ignorance concerning the bank records, or its presentation to the jury, as described in paragraphs 3-5.

8. The prosecution, by ignoring Gersh, put on a sham case, a parade of witnesses proving the admitted fact that petitioner received over-ceiling payments. The real issue was why, not whether, petitioner sent cash to Gersh. The question is, do you believe petitioner or Gersh. The case should never have been brought unless the prosecution believed Gersh. Yet the Government kept Gersh out of the court room. Why? Because it was aware how the case would stand if Gersh were called to the stand. Once it was confirmed to the jury that the funds had actually reached Gersh, petitioner could point out the difficulties in Gersh's explanation: That Gersh's contradiction of petitioner was based on his own interest in claiming he had returned funds which otherwise represented income in his hands. That it was not plausible that petitioner would

continue to send funds to Gersh to buy machines, time after time, only to have Gersh promptly return the funds each time saying he could not buy the machines.[16] And most important, petitioner would now be able to introduce the documentary evidence impeaching Gersh's account, which had been erroneously excluded at the first trial.

The Government's failure to call Gersh is mild in comparison to later developments. But in itself it was a maneuver to obtain a conviction by unsound inferences from a partial record, a device to induce the jury to convict because it did not credit petitioner's (seemingly uncorroborated) testimony of cash payments to Gersh. Whether or not the prosecution was required to call Gersh, its failure to do so necessitated scrupulously fair dealing in regard to matters where Gersh would have corroborated petitioner. That is part of the setting for testing the other actions complained of—the prosecution's release of Gersh without notice to defense counsel; its answers frustrating defendant's efforts to identify the corroborating bank records, and the presentation to the jury assailing petitioner's (apparently unsupported) testimony as a fabrication.

B. Judge's Refusal to Reopen Case

9. The Court erred in refusing to reopen the case, to permit defense a reasonable opportunity to call Gersh in order to identify Gersh's bank account record.

The time sequence was as follows: The prosecuting attorney released Gersh on a Friday, during a 3-day recess. On Monday after the conclusion of defendant's testimony, defense counsel was frustrated from identifying the bank records by the actions of the Government officials denying knowledge thereof. Defense counsel perforce rested. The Government rested forthwith. And thus at approximately 10:30 a.m. the taking of evidence was concluded. The

[16] See Record No. 12992, R. 559-560, 563-4, 575-6, 586-8, 601-8; Appendix C, pp. 19a-20a, 22a-24a, 28a-29a, 35a-39a.

judge recessed until 1 p.m. to begin argument to the jury. Defense counsel opened the afternoon proceedings by stating that he had just learned during the recess that Gersh was in fact in San Francisco, and asked for an opportunity to produce Gersh through a subpena, to identify the bank record, and that the case be reopened for this purpose. The prosecuting attorney stated that Gersh had come to San Francisco the previous evening but not under Government subpena, that Gersh had been told not to come but nonetheless seems to be in town (R. 464-469).

Although defense counsel pointed out that the document was "of vital interest to the defendant's case" (R. 468), the judge denied the application forthwith. In his remarks he stated that he should not be so abrupt, but that the case was at too late a stage, that defense counsel could have subpenaed Gersh. He later said that the evidence was material and that the defense application would have been granted if timely made, but was not now timely (R. 468-473).

The request of defense counsel was presented only two-and-one-half hours after he was surprised by prosecuting attorney's tactics regarding the bank records. This was the first order of business after the brief recess called when the case was submitted. No prejudice to the Government could ensue. In the circumstances, the failure to grant a request of admitted materiality on the ground of lack of timeliness is a harsh and technical ruling which departs from the standard of substantial justice which must infuse criminal proceedings. The accepted judicial practice is to reopen the case where substantial items of evidence is concerned.

What the cases *say* is that reopening a case is a matter for the sound discretion of the court. What the cases *hold* is that sound discretion is to be exercised by reopening the case where the evidence is material and significant. See 23 Corpus Juris Secundum, p. 463, sec. 1055:

> "Where it appears, on application to reopen a case to permit the introduction of further testimony, that

> the proposed testimony is of substantial importance to accused, the application should be granted."[17]

The liberality of the Federal cases in reopening a trial, at least before argument to the jury has begun, is in contrast to a stricter attitude on adjournments sought before trial has begun. There is good reason for the difference in attitude, since the importance of the evidence is sharpened by the very course of the trial.

The Federal cases clearly reflect the accepted judicial course of permitting reopening. We have not found a case where a trial court was reversed for failure to reopen the case. That only proves the point. Certainly there are legions of instances where defendant makes the application. But the cases never appear in the reports because the accepted course is to grant the application when the evidence involved is substantial; the defendant can not appeal the reopening, since the ruling is favorable to him, and the prosecution can not appeal an acquittal.

The appropriate Federal Digest keynote reveals a steady stream of decisions granting the Government's motion for reopening a case prior to argument to the jury; the reopening is held to be an exercise of sound discretion. The cases relied on by the court of appeals are to that effect. See *Brink* v. *United States*, 60 F. 2d 231, 234 (C.A. 6), cert. denied, 287 U.S. 667, where the court reopened the case and allowed the Government to introduce "highly relevant testimony tending to show the condition in which appellant kept his bank accounts"; *Horowitz* v. *United States*, 12 F. 2d 590 (C.A. 5). The other cases include *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), cert.

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[17] See e.g. *People* v. *Oxnam*, 170 Cal. 211, 215, 149 Pac. 165: "While the matter of allowing a party to reopen his case is one committed to the discretion of a trial court, if it had been made to appear to the lower court the proposed testimony was of any substantial importance to defendant, we should say that in the exercise of that discretion an opportunity should have been given to introduce it."

denied, 335 U.S. 830; *Haugen* v. *United States*, 153 F. 2d 850 (C.C.A. 9); *Latch* v. *United States*, 73 F.2d 840 (C.C.A. 9); *McGrew* v. *United States*, 281 Fed. 809 (C.C.A. 9); *Kalen* v. *United States*, 196 Fed. 888 (C.C.A. 9); *United States* v. *Noelke*, 1 Fed. 426 (C.C.A. 2d).

If the decisions allow liberality on this matter to the Government, with all its vast resources, how much more important in the interest of justice is it to assure liberality to the defense. Certainly the Government could not claim it had released witnesses who would refute the witness sought by petitioner, or any other prejudice.

Only one case in the Federal Digest approves the denial of a defendant's motion to reopen the trial before argument to the jury. That case points out that no showing was made as to the nature of the evidence sought to be added to what had already been received, or as to the witnesses by whom it was expected to be given. *Alexis* v. *United States*, 129 Fed. 60 (C.C.A. 5). It is plain that the accepted course of proceedings is for the trial judge to reopen the trial, at least before argument to the jury has begun, to permit the introduction of substantial evidence of importance to the accused.

In sustaining the trial judge, the court below noted only that petitioner could have subpenaed Gersh (R. 510; Appendix A, p. 7a). It did not consider the explanation that defense counsel had not anticipated the difficulty in identification of the bank records, and the impact of prosecution's tactics of releasing Gersh without notice to defendant. See paragraph 7, above.

The abrupt ruling of the trial judge was not a sound exercise of discretion. Petitioner's liberty is at stake, and the evidence is critical. Sound discretion required the granting of the application, although of course under reasonable safeguards to avoid undue delay. The trial judge permitted impatience to triumph over substantial justice. Opportunity for a full defense is the essence of a fair trial.

C. Charge to the Jury

10. In upholding the charge, the opinion below is in conflict with the decision of another circuit court of appeals and fails to apply an applicable ruling of this court.

The judge charged the jury as follows (R. 483):

> "So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believed his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

The charge riveted the attention of the jury upon the question of whether or not they believed the defendant, and distracted their attention from the basic duty of the Government to prove its case, and to prove it beyond a reasonable doubt.

Both the language quoted and the charge taken as a whole, impelled the jury to convict solely because they did not affirmatively believe petitioner's account of large cash shipments to Gersh. That is error as a matter of law, but an error of particular importance in this case. It put the finishing touch on the prosecution's mischievous campaign in the minds of the jury, which did not know of the corroborating evidence.

The charge was particularly prejudicial since the judge knew that only the previous day he had denied petitioner an opportunity to present corroborating evidence. Notwithstanding the rigor of that ruling, the instruction focussed on the point of cash transfers and the Government's claim that petitioner's testimony was fabricated. The judge referred to the illegality of the transactions involved and the failure to keep records as factors which the jury could take into account, and "which the Court

considers are important factors to take into account" (R. 484.). Even the charge that a jury might disregard all of a witness' testimony if they consider he testified falsely in any material respect (R. 479), which is generally proper, had the impact in this case of inducing conviction if the testimony of cash shipments was found not plausible.

The opinion is in conflict with *Balman* v. *United States*, 94 F. 2d 197 (C.A. 8th Cir.). In that case the trial judge charged:

> " . . . Proof that the defendant was in possession of property recently stolen raises a presumption of guilty knowledge in the absence of an explanation, and it is for you to determine whether the defendant's explanation given by him in this case is sufficient to overcome the presumption; that is, it is for you to determine whether you believe the defendant's explanation of the trunk containing the furs being in his residence."

The court of appeals held that this charge was in error, in effect imposing upon the defendant the duty to establish his innocence and omitting the instruction that acquittal might follow on the Government's case even without an explanation by defendant.

See also *United States* v. *Phillips*, 217 F. 2d 435 (C.A. 7 Cir.), holding that the burden of proof had been shifted to defendant by the judge's failure to charge that the testimony of prosecution's own witnesses might negative proof of wilfulness beyond a reasonable doubt.

The charge obliterated the point, of which the jury should have been made specifically aware, that the Government's own witnesses on the payment of over-ceiling prices to petitioner also testified as to the existence of conditions which indicated that petitioner may not have had income in view of the over-ceiling prices necessary to obtain the whisky. There was testimony that the established wholesalers could not obtain supplies, that there was

no whisky available in the area except at over-ceiling prices. (Petitioner admittedly resold some of the whisky at retail ceilings, which would mean a loss on any whisky bought above ceiling.)

The court of appeals was obviously troubled by the charge but found that it was saved, taken as a whole. It said that the charge that acquittal should follow from a belief in defendant's "story" implied a reference to the defense as a whole, including the testimony of the prosecution's own witness, rather than the defendant's testimony. If anything the term "story" as used in the charge had the effect not only of focussing attention on petitioner's testimony but of doing so in a derogatory fashion, increasing the real burden on defendant. Petitioner was entitled to a clear instruction indicating the possibility of acquittal based on the testimony of prosecution's own witnesses.

The court of appeals also noted that the charge contained various references to the Government's burden to prove guilt beyond a reasonable doubt. But it is elementary that the general portions of the charge are pale to the jury compared to the review of the specific facts and issues.

In *Bihn* v. *United States*, 328 U.S. 633, this Court held that where the case against the defendant was a close one, manifold repetitions of the general principle of presumption of innocence would not outweigh the fact that on the crucial specific passage of the charge, there was substantial possibility that the jury would conclude that the defendant had the burden of explaining possession of stolen ration coupons.

In this case, the specific parts of the charge had essentially this impact upon the jury: (1) The Government says defendant's account of cash shipments is a fabrication. (2) Defendant contends he made no profit. (3) If you believe his story, return a verdict of not guilty; if you do not believe his story, convict him. The surrounding parts of the charge heighten, if anything, the impression generated in the jury that to acquit they had to believe the defendant's testimony.

Each time the petitioner was convicted only because the Government kept from the jury the full evidence relating to Gersh.

At the first trial, however, the Government was aware of its burden to prove an income tax violation. In the second trial the prosecuting attorney secured a conviction in effect by proving admitted ceiling price violations, and by extreme measures diverting from the jury the real facts and issues as to income tax evasion.

The prosecuting attorney saw fit to introduce as a judicial admission the fact that Wolcher pleaded guilty to a criminal information charging ceiling violations on whisky involved in the present case. The court overruled petitioner's contention that the previous criminal proceeding was cumulative as to the admitted fact of receipts over ceiling, yet prejudicial in the mind of the jury (R. 243).

The prosecuting attorney stated in a surface spirit of fair play, that he would anticipate the judge would instruct the jury to disregard the other criminal proceeding except as proof of the fact of over ceiling receipts. Defense attorney said that that would only emphasize the prejudicial evidence (R. 245). The court charged the jury that defendant had already pleaded guilty to price ceiling violations and was not on trial again for the same offense (R. 483-4). The judge stressed that the illegality of the transactions and failure to keep records were important factors in his view.

Lip service is doubtless paid by the Government to the principle that petitioner's admitted violation of OPA ceilings cannot be used to override his innocence of income tax fraud. The actions of the Government officials speak louder than their words.

CONCLUSION

The Government's concern in enforcing the revenue laws and the stern dispensation of justice to wilful violators can not be doubted. But, the Government has a

greater interest in assuring that it is justice that is dispensed, however sternly. As a great Solicitor General has said, "The United States wins its point whenever justice is done its citizens in the courts."

In this case justice was denied: This was due principally to the prosecution's misconduct. The conditions created by that misconduct both induced and were seriously aggravated by the impatience of the trial judge and his charge slanting the burden of proof.

The resulting prejudice to petitioner can not be doubted. The spontaneous jury recommendation of leniency emphasizes how troubled it was even upon the case as it was permitted to develop.

Our democratic society stands in fundamental danger if the prosecution's interest in securing convictions is placed above justice. It is timely for this Court to give renewed and vigorous expression of the principle of fair dealing toward the accused, and to provide a meaningful application of that principle in the matter of evidence in the Government's possession corroborating a taxpayer accused in criminal proceedings. The petition for a writ of certiorari raises important issues of the administration of justice in criminal proceedings and should be granted.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:
LEO R. FRIEDMAN

JUL 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 15, 1956.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A, p. 1a. It has not yet been reported.

The opinions of the Court of Appeals in earlier phases are reported in 200 F.2d 493 and 218 F.2d 505.

The order of the District Court appears at R. 26.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1956. Rehearing was denied on June 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTION PRESENTED

In a prosecution for evasion of income taxes based on alleged profits from black market operations, where defense seeks to corroborate defendant's testimony of his payments to a co-conspirator as a part of such operations, is the testimony of a middleman as to the acts and declarations of the co-conspirator made in the course of and for the purpose of carrying out such black market operations admissible as part of the res gestae.

STATUTE INVOLVED

26 U.S.C. sec. 145(b). Internal Revenue Code, sec. 145(b) (as in effect prior to the Internal Revenue Code of 1954) reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade any tax imposed by this chapter or the payment thereof, shall, in addition to the other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

Rule 33 of the Federal Rules of Criminal Procedure:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

STATEMENT

This case arises on a motion for new trial on the ground of newly discovered evidence and presents the issue of the legal admissibility thereof. Before setting forth the newly discovered evidence it is appropriate to review the factual background exclusive of the newly discovered evidence.

A. BACKGROUND

Petitioner's conviction for income tax evasion was of course on a record lacking the newly discovered evidence. An earlier conviction was reversed by the Court of Appeals for the Ninth Circuit, *Wolcher* v. *United States*, 200 F.2d 493—Record No. 12992. On a second trial petitioner was convicted and the conviction was affirmed in *Wolcher* v. *United States*, 218 F.2d 505—Record No. 14109. Petitioner was sentenced to two years imprisonment. This Court denied the petition for certiorari—No. 77, October Term, 1955.

Both trial records were before this Court on the petition for certiorari and are before this Court now. The factual background of the conviction is discussed in detail in petition No. 77, 1955 Term, and the salient portions of the first record (No. 12992) are reprinted in the Appendix to said petition. (Appx. C., pp. 18a-44a). All the foregoing is part of the record on this motion for new trial—Record No. 14919, see pp. 4-5, 67.

1. Petitioner's Admitted Black Market Receipts on Sales of Case Whiskey. His Explanation of Equivalent Payments Made to Gersh to Purchase Case Whiskey on the Black Market Negativing Income From Petitioner's Wholesale Activities, and Resulting in Profits to Petitioner at Retail Tavern Level Where All Taxes Were Paid and No Evasion Is Charged.

The Government's proof of income tax evasion consisted of evidence that petitioner collected sums in cash from black market sales of case whiskey. The facts were described in the first opinion, see 200 F.2d 493, at 495:

> "The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher."

At the second trial the Government introduced testimony similar to that presented at the first trial. The Government also introduced, over objection, petitioner's previous conviction on the charge of ceiling violation (R. 14109, 239-245).

The court below set forth petitioner's defense as follows (200 F.2d at p. 495):

> "Wolcher admitted the overceiling transactions, but contended that although he received those pro-

ceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make overceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the overceiling bonus paid Gersh amounted to $20 and on others to $25 a case."

Petitioner's own admissions accounted for the bulk of the Government's proof of his black market receipts on sales of case whiskey. These overceiling receipts of petitioner were set forth as follows in the summation to the jury by Assistant United States Attorney Schnacke:[1]

Cases of Whiskey Purchased by Defendant	Black Market Sales No. of Cases	Unreported Profit
A. Shipped from East Coast to:		
Franciscan Distributing Co.		
100 Supreme Bourbon	68	$ 1,472.20
500 Schenley Royal Reserve	335	7,292.95
500 Golden Wedding	450	11,475.00
1,000 Gallagher & Burton	815	21,243.00
George Barton Co.		
~~500 Gallagher & Burton~~	1,432	47,370.56
		$88,853.71
B. Purchased from Rathjen Bros.		
500 Old Brook	300	6,150.00
5,138 Total	3,400	$95,003.71

[1] The data in the Table are from pp. 3-9, Transcript of Mr. Schnacke's opening argument, August 31, 1953.

Transcripts of the summations at the second trial are filed with this Court and are part of the record on this petition (R. 14919, pp. 5; 65-6.)

Petitioner testified that part of the whiskey which he purchased by making overceiling payments was transferred *at the ceiling price* shown on the invoice to what are here referred to as the Wolcher taverns, taverns in which petitioner or members of his family were identified as owners. (R. 14109, p. 365.)

In summary, petitioner's testimony that he did not realize any income on his purchase and sale of case whiskey was based on the fact that the 5138 cases he purchased in the black market exceeded the quantities he sold in the black market. In regard to the case whiskey sold to outside taverns on the black market, he made a profit since his black market sales overages exceeded his black market purchase overages on that whiskey. But he testified that these net black market profits were absorbed by the losses taken on sales to the Wolcher taverns—where petitioner's sales were at ceiling but his purchases were for said ceiling price, as set forth in the invoices, plus black market purchase overages. (R. 14109, p. 366.)

Petitioner did not say that he made no profits as a result of his black market activities. He expressly testified that the profit was not from sale of liquor *by the case*, at wholesale, but was rather realized at the retail (tavern) level in the sale of liquor by the glass. (R. 14109, pp. 409-410).

It is conceded that the Wolcher taverns made substantial profits as a result of petitioner's black market activities. Their purchases of approximately 1,000 cases of whiskey at ceiling rather than black market prices alone meant a savings to them of over $17,500 as a conservative estimate based on black market price paid by petitioner. The saving is even greater if the ceiling price is compared with the $60 price

paid to petitioner by outside retail taverns. But there is no charge or claim, and there could be none, of understatement of income in the returns filed for the Wolcher taverns.

2. Petitioner's Testimony of His Payments to Gersh. (References to Record No. 14109.)

Petitioner testified that for the purposes of acquiring whiskey from the East, he contacted William Gersh, who published a coin machine paper. He first had a talk with Gersh about whiskey in the spring of 1943.[2] As a result in June 1943 he sent Gersh a bank draft in the amount of $5,000 to apply on the overage that the whiskey cost over and above its regular invoice price. As a result the first shipment of whiskey arrived from the East through Franciscan Co. (R. 353-9.) In his first arrangement with Gersh he was to pay $20 a case overage above ceiling. This continued for three shipments. Thereafter at Gersh's suggestion the overage was $25 a case. (R. 361-2.)

Petitioner further testified: I sent the money to Gersh in various ways. I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360.)

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whiskey (R. 361):

---

[2] Petitioner was asked what conversation he had with Gersh. The Government objected and the objection was sustained. (R. 355-6).

$ 5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft. Exh. E, R. 370) and purchased a bank draft which I sent to him. (R. 363).

$ 3,300 cash by mail in the middle of August 1943 (R. 359).

$ 5,000 at the end of August 1943, in cash by mail (R. 461).

$12,500 by cashier's check payable to Gersh dated September 29, 1943, (Deft. Exh. I), which I purchased for cash (R. 378-9).

$60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November 1943 (R. 360-361); Deft. Exh. F. R. 371-2).

$30,000 cash by express in December or January 1944 (R. 362).

A number of mailings to Gersh of $1,000; $1,200; $1,500 apiece (R. 404).

$ 3,000 cash to Gersh in New York in 1944 for the purpose of winding up our transactions (R. 367-8).

Petitioner further testified: During this period I received money back from Gersh in accordance with our understanding for the two instances when I transferred money by check in a way that appeared on my books. I entered the original $5,000 on my books as a suspense item, Bill Gersh. When he returned the $5,000 by check dated August 13, 1943 (Deft. Exh. G, R. 374), we put it in the bank account and cancelled the entry (R. 364).

In November 1943 I didn't have enough overceiling money to send the required cash and I borrowed $30,000 to buy a bank draft payable to me which I endorsed over to Gersh. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380).

He sent me a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375) and a check for $2,000 drawn by his wife (R. 379; Deft. Exh. J. R. 383). Gersh's accountant suggested that I let Gersh pay for some equipment, to account in some measure for his handling that money. I arranged for Gersh to make a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased. (R. 376-7.)

The $12,500 cashier's check which I bought for cash did not appear on my books, and Gersh never returned that money. Nor did he return any of the cash money I sent him. (R.379.)

Petitioner testified that he kept no books as such on these transactions, and kept only a brief memorandum record at that time of amounts owing, which he later disposed of so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439).

The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whiskey transaction (R. 403-5).

Petitioner admitted he had no record of the money he sent to Gersh by mail or by express (R. 403-4).

3. The Evidence at the First Trial: (a) Corroboration in Gersh's Bank Records of Substantial Amounts From Petitioner by Check or in Cash by Mail or Express. (b) Gersh's Conflict With Petitioner as to the Purpose of the Payments and as to Petitioner's Personal Delivery of Cash.

At the first trial, Gersh was called as a rebuttal witness by the Government. His documentary bank records established and he admitted receipt of substantial amounts which petitioner testified had been sent to Gersh by check or in cash by mail or express. But

Gersh in his testimony contradicted petitioner as to the purpose for which money had been sent, and he denied petitioner's testimony of his personal delivery of cash to Gersh.

Gersh's testimony as to the alleged "coin machine" purpose of petitioner's payments is briefly stated in *Wolcher* v. *United States,* 200 F.2d 493, at page 495:

> "Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5,250, but that he had returned all the balance of the $85,000 to Wolcher."

In rejoinder, petitioner offered documentary evidence, trade magazines to prove that coin machines were freely offered and easily purchased without the need for advance cash, and correspondence to refute Gersh's assertion that he had arranged phonograph purchases for petitioner. These offers were opposed by Government counsel. The rulings of exclusion were reversed in *Wolcher* v. *United States,* 200 F.2d 493, at p. 499.

The following table shows the extent to which receipts from petitioner were corroborated by Gersh's bank records, and Gersh's denial of petitioner's personal delivery of cash.

Wolcher Testimony of Payments to Gersh (References to Record No. 14109)	Gersh Corroboration (References to Record No. 12992; relevant portions reprinted in Appendix C, Petition for Certiorari, No. 77, October Term, 1955)
$ 5,000 by check in June 1943 (R. 358, 363)	R. 12992, pp. 559, 585 Appx. C, pp. 20a, 27a
3,300 cash by mail, Aug. 1943 (R. 359)	R. 12992, p. 586 Appx. C, p. 28a
5,000 cash by mail, Aug. 1943 (R. 461)	R. 12992, p. 587 Appx. C, pp. 28a, 29a
12,500 cashier's check payable to Gersh, bought for cash, Sept. 1943 (R. 378-9)	R. 12992, p. 587-8 Appx. C, p. 29a
60,000 personally delivered Nov. 1943: $30,000 by draft; $30,000 in cash (R. 360-1, 371-2)	Gersh claimed he handled the $30,000 bank draft only to cash same for Wolcher. He denied receipt of the $30,000 cash which petitioner testified he personally delivered to Gersh. R. 12992, pp. 560-563, 588-592; Appx. C, pp. 20a-22a, 29a-32a
30,000 cash by express, Jan. 1944 (R. 362)	R. 12992, p. 592-3, Appx. C, pp. 32a-33a

4. Conviction at Second Trial Due to Lack of Evidence Corroborating Petitioner's Unsupported Testimony.

At the second trial, Gersh's bank account records—corroborating petitioner's cash mailings of $3,300, of $5,000, and of $30,000—were not in evidence.

Defense counsel was stopped from asking questions of Richard Appling, special revenue agent in charge, to lay a foundation for introducing in evidence the Gersh bank account records produced at the first trial. Mr. Schnacke objected that the bank account of some "stranger" to the trial was not material, and the line of questioning was stopped. (R. 14109, pp. 465-6.)

The prosecution released Gersh from subpena and did not call Gersh in rebuttal as at the first trial. The

record was closed. A few hours later, promptly on learning that Gersh was in San Francisco, and prior to submission to the jury, defense counsel sought leave to call Gersh, to identify the bank records. The request was opposed by the prosecution and denied by the trial judge. (R. 468-473.)

These rulings and actions are not challenged at the present time as reversible error. But they explain why, in considering the significance of the newly discovered evidence in relation to the totality of evidence which will be available at a new trial, it is necessary to consider the record in No. 12992, as well as the record in No. 14109 and the newly discovered evidence.

The fact that the defense rested solely on petitioner's unsupported testimony, and that there was no corroboration thereof, was stressed in the summation of Mr. Schnacke, the prosecuting attorney:

> "And then we come to these fantastic shipments of money to the east. We have only Mr. Wolcher's unsupported word for any amounts of cash that were shipped east. And examining those, I think we ought to look at what a businessman would do with amounts of cash of that sort. If there were any such amounts of cash sent, would they be sent in this fantastic fashion? $30,000, as I recall, bundled up in an express parcel and insured for a nominal amount. Case after case of a thousand, $1,500, stuffed into an envelope and sent by ordinary mail. I don't think that's a very persuasive story." (R. 14919, p. 7.)

In regard to petitioner's evidence, available from check records, showing a payment to Gersh of $47,500, with $35,000 eventually returned, the prosecutor stated:

> "But who was Mr. Girsh (sic)? Mr. Girsh was a man in the business of operating a magazine in

> the coin-operated machine field. Mr. Wolcher had, he says, tremendous amounts of correspondence with him—or large amounts of correspondence. Never a word in any of that about any liquor transactions. Mr. Wolcher told you that the only business outside of the magazine that he knew about Mr. Girsh possibly being in was that he might have had a farm at sometime or another. No word on his books about any of these checks concerning liquor. Mr. Wolcher told you that Mr. Girsh had handled or had paid for equipment that he had purchased for him. Mr. Girsh I don't think is a significant factor. The significant factor is Mr. Wolcher." (R. 14919, p. 8.)

The trial judge summed up the issue in his charge (R. 14109, p. 483:

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."
>
> * * *
>
> "So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case."

On this record, with the defense resting solely on petitioner's unsupported word both as to the purpose of his payments to Gersh and as to the making of any cash payments to Gersh, the jury convicted but with a recommendation of leniency. (R. 14109, p. 6.) Judg-

ment was for two years' imprisonment and $10,000 fine (R. 19).

5. Corriston's Newly Discovered Testimony Corroborating Petitioner.

The motion for new trial on the ground of newly discovered evidence presented the testimony of Edwin Corriston, by affidavit (R. 14919, pp. 13-17), and tender to testify, summarized as follows:

Corriston is in the business of operating amusement machines and has long known Gersh. In the spring of 1943 he met Gersh on Tenth Avenue in New York, where most of the coin-operated machine business is carried on. Gersh told Corriston that Wolcher, a mutual friend, had become interested in taverns on the West Coast; that he, Gersh, was looking for a contact in the liquor business so that he could obtain black market liquor for Wolcher; that he had received cash from Wolcher for that purpose. Apparently to convince Corriston that he was seriously interested Gersh pulled out an envelope and showed a wad of hundred dollar bills. Corriston suggested a whiskey contact at that time.

Several months later Gersh told Corriston at lunch that the previous contact had petered out, that Wolcher needed more whiskey and did Corriston have any further ideas on where he, Gersh, could get it.

Corriston relates that a few days later he advised Gersh that he, Gersh, would be contacted by a man named Garry Taylor or his associate Carlin; that Taylor called Corriston and said the transaction would require about $50,000 in cash and that he and Carlin wanted to be sure that Gersh was good for so much

money; that Corriston told Gersh what Taylor had said, that Gersh said that was no problem as he had already received plenty of cash from Wolcher, and that Corriston passed that information on to Taylor.

Corriston further relates that, as a result of these calls, Corriston arranged a meeting between Taylor, Gersh and himself in New York and that he told Gersh that Taylor wanted Gersh to bring $10,000 with him to the meeting to show good faith and make the deal. The meeting was held; there was a conversation pertaining to the monies involved; Taylor said there was approximately $50,000 involved in cash payments for the whiskey; Gersh said he had all the money in hand and was prepared to pay for the shipments when ready. Taylor said he wanted $10,000 now; at that meeting Gersh paid Taylor the $10,000 deposit. Later Gersh called Corriston to thank him again, for the Taylor whiskey contact.

Corriston further deposed that he did not reveal his knowledge of the transactions to petitioner until after the second trial because of his reluctance to get involved in a criminal case.

6. Opinions of Courts Below, and of Justice Douglas Granting Bail Pending Determination of Evidence Question.

The District Judge denied the motion for new trial stating that there was no legal basis for granting a new trial (R. 26).

In his opinion of December 31, 1955, granting bail (Appendix B, infra, p. 8a) Mr. Justice Douglas stated that the issue of the admissibility of Corriston's evidence raised a substantial question. "If the evidence is admissible, it might well tip the scales in defendant's

favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail." (Id. at p. 9a.)

The opinion of the Court of Appeals is in Appendix A, infra, p. 1a. The court affirmed, holding that Corriston's evidence was not legally admissible.

REASONS FOR GRANTING THE WRIT

I.

In holding that rejection of the evidence proferred by petitioner was required by basic principles of the law of evidence, the court below rendered a decision in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Aetna Ins. Co.* v. *Licking Valley Milling Co.* 19 F.2d 177 (1927).

The conflict arises from the difference in the views of the two courts as to principles set forth in *St. Clair* v. *United States* 154 U.S. 134 (1894), concerning the admissibility as part of the res gestae of acts and contemporaneous declarations accompanying or causally related to acts in issue. The court below limits the *St. Clair* case as permitting admissibility only against a co-conspirator. The court below held that the rule excluding hearsay means that such declarations cannot be received as part of the res gestae in behalf of a co-conspirator or principal. The contrary was held by the Court of Appeals for the Sixth Circuit, which applies the res gestae principles as they were set forth by this Court in the *St. Clair* case, and without such limitation.

Petitioner submits that the court below refused to apply the principles as to the scope of the res gestae

doctrine set forth by this Court in *St. Clair* v. *United States* supra, and properly applied by the Sixth Circuit in the *Aetna* case, and that the court below improperly distinguished and limited the *St. Clair* decision.

The decision below has the effect, not only for this case but for future criminal proceedings, at least in the Ninth Circuit, of shutting the eyes of judges and juries to evidence that is essential to a just verdict. The question is one of general importance warranting review by this Court.

1. The prosecution's proof of income tax evasion consisted of proof of petitioner's activities in the whiskey black market. The prosecution even introduced proof of petitioner's black market conviction over objection that this was cumulative for the prosecution yet prejudicial to petitioner (R. 14109, p. 243).

The defense is that when petitioner's whiskey black market activities are taken as a whole, they negate income tax evasion. Petitioner admitted sales of case whiskey in the black market; indeed he admitted black market sales of a far greater amount than the Government proved directly. But petitioner established, and it is not controverted, that petitioner purchased approximately 5,000 cases of whiskey, and that he sold approximately 1,000 cases to the Wolcher taverns at ceiling. It is petitioners defense that all 5,000 cases purchased by him required black market overages, and that these overages equal his black market receipts on the lesser amounts sold by him in the black market.

The whiskey purchased by petitioner which was not resold in the black market was sold at ceiling. The

Wolcher taverns saved over $17,500 by purchasing from petitioner at ceiling prices instead of paying black market prices. But there is no contention, and there could be none, of understatement of income in returns filed for these taverns.

Petitioner's wholesale whiskey activities in the black market did not yield taxable income because the profits on sales above ceiling to outsiders were absorbed and offset by the losses on sales at ceiling to the Wolcher taverns. Such profits as petitioner made from the retail activities of the Wolcher taverns does not involve any claim of tax evasion since there is no claim or evidence of understatement of income for the Wolcher taverns.

The key element in petitioner's defense was his testimony that in his whiskey black market activities he was in league with a William Gersh to whom he transferred the overages for purposes of acquiring case whisky in the black market. These moneys were transferred in part by check, in part by mailing cash, in part by personal delivery of cash.

Petitioner's testimony was challenged by the Government as a fantastic fabrication, a defense resting wholly on his unsupported word.

Petitioner could not corroborate his testimony by calling Gersh for Gersh was a hostile witness. At the first trial Gersh's bank records established, and Gersh accordingly admitted, receipt of large cash sums received from petitioner through the mails. But Gersh claimed that the money was sent to him by petitioner to make cash payments in advance for coin machines.

2. As a matter of common sense and simple justice it seems plain that Wolcher should be able to corro-

borate his testimony of his black market conspiracy with Gersh by calling the middleman, who provided the access to the sources of the black market whiskey, to testify as to Gersh's acts and declarations to him in the course of Gersh's black market activities, as proof that Gersh, depicted by the Government as a mere coin magazine publisher who was not a significant factor (see *supra*, pp. 12-13), was in fact fully engaged in such whiskey black market activities.

The court below held that the only basis for admitting the declarations of a co-conspirator is that they are vicarious admissions, and that therefore they are admissible only against—and not in favor of—a co-conspirator. The doctrine of vicarious admissions is one basis but it is not the only basis for admitting the declarations of a co-conspirator.

The more fundamental basis of admissibility is this—that where persons are associated together in a criminal plan their various acts in the course of execution of the criminal plan and their declarations accompanying such acts or causally related as preparations for such acts, are admissible as the res gestae in the interest of justice, so that the jury may have a complete view of the intertwined acts and declarations. *American Fur Co.* v. *United States*, 2 Pet. 358, 365 (1829).

In *St. Clair* v. *United States*, 154 U.S. 134, 149 (1894), Justice Harlan said:

> "St. Clair, Sparf, and Hansen were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of the res gestae, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time

the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

* * *

" 'The res gestae, 'Wharton said, 'may be, therefor, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' 1 Wharton, Ev. § 259."

The court below refused to recognize that the very fact that Gersh's declarations were made, interwoven with his other acts, was important evidence irrespective of the truth of what he declared.

The court below further held that *St. Clair* does not permit the use of declarations to show the truth of what

is declared unless the acts and declarations of a co-conspirator or agent are offered in evidence *against* a co-conspirator or principal.

The ruling below is in conflict with the rule followed by the Court of Appeals for the Sixth Circuit. In *Aetna Ins. Co.* v. *Licking Valley Milling Co.*, 19 F.2d 177 (1927), the declaration of the agent to his principal was admitted in favor of the principal for testimonial use, to prove the truth of what the agent said at the time. The issue in *Aetna* was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna company. Plaintiff's manager testified that in his presence Bennett, who represented plaintiff, telephoned someone, identified to him by Bennett as Aetna's agent Stone, and that "after the conversation over the 'phone, he [Bennett] told me the insurance was in effect." 19 F.2d at 178. The court held that Bennett's statement, made at the close of this conversation, was admissible as part of the res gestae in favor of his principal—to show that the insurance had been placed in effect.[3]

The court cited its earlier opinion in *Tuckerman* v. *United States*, 291 Fed. 958 (6th Cir. 1923), cert. denied, 263 U.S. 716, a prosecution for bribery. There the declaration of an official to his wife, that defendant had given him money, was held admissible. That dec-

[3] The rule, as stated in 32 C.J.S. Evidence, Sec. 410, p. 28, is that declarations of an agent made at the time of a particular occurrence or transaction, or near enough thereto to form a part thereof, which tend to explain or illustrate it, made whilst the agent is acting within the scope of his authority, may be given in evidence as part of the res gestae, "either for or against the principal or employer."

laration, the court said, was a "contemporaneous statement directly relevant to the primary fact of [defendant's] payment of money, a fact not only natural, but important to be stated to [the wife], who was to give clearances." 291 Fed. at 970.

In *Aetna* the court held, citing *Tuckerman*, that Bennett's declaration was admissible even though declarant was not a party to the case, and even though there were no circumstances of shock, stress, or excitement which would qualify the declaration as a "spontaneous exclamation." The Aetna decision pointed out that the declaration was admissible as part of the res gestae so long as the statement when made was, in the words of Wharton:

> "* * * in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself; St. Clair v. United States, 154 U.S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936, where the court cites with approval the definition of res gestae found in Wharton on Evidence (2d Ed.) § 259, 1879." 19 F.2d at 180.

Corriston's testimony should have been admitted under the res gestae rule, as set forth in *St. Clair* and *Aetna*, without being excluded because it involved hearsay to some extent. Moreover, it should clearly have been admitted as proof of the fact, which the Government denied, that Gersh was engaged in whiskey black market[4] activities, and in contravention of the prosecu-

[4] The prosecution argued to the jury that Gersh was shown to be in the coin machine business and not the whiskey business, that indeed petitioner testified that Gersh had handled such coin equipment for petitioner, and that there was nothing apart from petitioner's uncorroborated testimony to show that Gersh was involved in whiskey black market activities. See pp. 12-13, above.

tor's claim that Gersh was merely a coin magazine publisher who was not a significant factor in the whiskey black market activities:

a. Corriston testifies that Gersh solicited him on two different occasions to obtain black market whiskey. He is testifying as to Gersh's words, to be sure, for solicitations are words. Gersh's words are not used testimonially to prove the truth of the words uttered but rather to prove that Gersh actually uttered these words of solicitation.

b. As the middleman between Gersh and Taylor, the source of the supply of case whiskey, Corriston testifies that in the negotiation to set up a further meeting he advised Gersh that it was necessary to assure Taylor that Gersh was good for $50,000 in cash, with a $10,000 advance deposit; that at the resulting meeting Gersh gave assurances to Taylor of $50,000 cash on hand, paid Taylor a $10,000 deposit, and entered into an agreement to pay Taylor the additional $40,000. (R. 16.)

Without any hearsay use whatever, the mere fact that Gersh made these statements, which are "verbal acts" of solicitations, negotiations, assurances, and agreements relating to the purchase of black market whiskey, is proof of Gersh's black market activities that is unquestionably material.

c. Moreover the court below concedes that statements of present intent are admissible in evidence. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892). Accordingly Gersh's statements were admissible to show his intention to obtain substantial volumes of black market whiskey and his intention to pay $40,000 cash in addition to the $10,000 deposit.

Most of Corriston's testimony is accordingly admissible under the foregoing rules. His testimony that Gersh stated that he was acquiring the whiskey for petitioner is also admissible for the reasons set forth in Wharton, and the *St. Clair*, *Aetna* and *Tuckerman* cases.

Gersh's statements both (1) are illustrative of the character of his black market purchases,—as made in petitioner's behalf and not for his own account, and (2) are integrally and causally related to the black market purchases, since they were made first as part of Gersh's efforts to induce Corriston to act as middleman, and second, to assure Corriston that he, Gersh, had the necessary cash to consummate the purchases since he had obtained the cash from petitioner.

The *St. Clair* rule applies to interrelated acts and declarations of persons while engaged in execution of the criminal plan, and holds them admissible as part of the res gestae. The statements thus admissible as res gestae are limited to declarations made at the time of or in causal relation to the execution of the criminal plan. Otherwise the declarations may represent "the interposition of voluntary individual wariness seeking to manufacture evidence for itself." *St. Clair* v. *United States*, supra, 154 U.S. at 149.

Gersh's statements to Corriston in the course of his black market activities are equally if not more reliable than Gersh's present testimony. These statements to a middleman who was himself part of the conspiracy are not subject to attack as in anyway self-serving or exculpatory when made. By their very nature they did not reflect an "individual wariness seeking to manufacture evidence for itself." Where statements of a co-

conspirator are naked declarations not causally related to the actual execution of the plan, there is reason to limit admissibility only to statements qualifying as vicarious admissions. But Gersh's statements to Corriston were contemporaneous with and integrally and causally related to the conduct of the conspirators in the black market activities. Reason, justice and precedent all point to the conclusion that the statements are admissible as part of the res gestae of the conspiracy.

II.

If this Court agrees that the questions of the law of evidence warrant certiorari, it need have no hesitancy because of the passages of the lower court's opinion that the newly discovered evidence would not have affected the result.

The importance of the newly discovered evidence was aptly described by Justice Douglas (Appendix B):

> "The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. * * * *If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case.*" (Emphasis added.)

The opinion of the court of appeals below reveals that it completely misunderstood the facts of the case and what the total evidence would consist of on a new trial. This doubtless was due to the lack of any analysis

or findings as to the facts and evidence by the district judge. The court of appeals did not have or seek the trial judge's exercise of discretion as to the facts on the assumption that the newly discovered evidence was admissible. On the assumption that the newly discovered evidence was inadmissible, the district judge did not analyze or make findings as to the factual background, but merely held that there was no legal basis for granting the motion. The court of appeals was apparently unaware of the fact that the totality of the evidence on a new trial involved consideration of the testimony and documentary evidence established by Government witness Gersh at the first trial but not part of the record of the second trial. The true and complete factual background makes it clear that the newly-discovered evidence—if admissible—was of the utmost significance.

1. The court of appeals mistakenly understood that petitioner's defense "was simply that *he made no profits*" (italics by the court), and found implausible an assertion that he would engage in black market activities without any gain.

On the contrary, petitioner testified that his black market activities resulted in profits at the retail level by the Wolcher taverns; what he denied was any profits by him at the wholesale level in selling whiskey by the case. He testified that "there was a profit made, but not from the sale of the liquor by the case as such." (R. 14109, pp. 409-410).

Petitioner's assertion was not merely that the Wolcher taverns were thereby enabled to get whiskey, but was further that, instead of paying black market prices, they were enabled to obtain the whiskey at

ceiling. This was possible only because petitioner's black market profits absorbed what would otherwise have been losses on sales at ceiling to the Wolcher taverns. These taverns concededly made substantial profits as a result of petitioner's black market activities. Their purchases at ceiling prices instead of black market prices was worth over $17,500. But there has not been any suggestion, and there could be none, of understatement of income in the returns for these taverns.

2. In commenting as to the facts without any guidance from the district judge, the court below erred in asserting that at a new trial petitioner's defense would rest solely on his uncorroborated testimony as to the disposition of a large portion of the black market moneys he admittedly received.

a. First, the court palpably erred in asserting that petitioner had been "illegally receiving some $200,000." That figure jumbles together the ceiling price, which the outside tavern owners paid by check to the San Francisco wholesaler, and the cash overage which was received by petitioner. Mr. Schnacke's summation shows that the proof established cash receipts to petitioner of only $88,853.71 on the Eastern whiskey, and only $6,150 on the West Coast whiskey. (See p. 5, supra.)

b. Second, the court below did not take into account the corroboratory significance of the evidence at the first trial. At the second trial it was established that petitioner made payments to Gersh by check of $47,500, and that Gersh repaid $35,000. The prosecutor in his summation both dismissed the $12,500 net thus paid to Gersh as minor and stressed that there was no

corroboration of petitioner's unsupported word that this was for black market whiskey payments. (R. 14919, pp. 7-8.)

The evidence at the first trial, however, provides more extensive corroboration as to the amount of petitioner's payments to Gersh. First there is the direct corroboration: Gersh's documentary bank records, identified by Gersh, corroborated petitioner's testimony of cash mailings to Gersh of $8,300 in August 1943 and $30,000 in January 1944. Second, there is the corroboration when the disputed evidence at the first trial is viewed again in the light of Corriston's testimony. At the first trial the significant clash between Wolcher and Gersh concerning amounts paid to Gersh arose with respect to Wolcher's testimony that he personally delivered $60,000 to Gersh in November 1943—$30,000 in cash, and $30,000 in a bank draft. (R. 14109, pp. 360-361; Dft. Exh. F, pp. 371-2.) Gersh testified that he only handled the $30,000 draft for the purpose of cashing the check for petitioner. Gersh denied either having retained the $30,000 of the bank draft or having received the $30,000 in cash. Corriston's testimony clearly corroborates Wolcher on this receipt of $60,000 by Gersh for whiskey black market purchases. For only Wolcher's testimony—and not Gersh's—account for Gersh's ability to arrange for the $50,000 overage. And at the meeting attended by Corriston in November or December 1943, Gersh not only paid Taylor a $10,000 deposit, but also stated his intention to pay the balance of the necessary $50,000 out of cash on hand. Gersh's statement of intention is of course circumstantial evidence that he had that cash on hand. It is indeed circumstantial evidence that he later paid that cash to Taylor. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892).

At the first trial, although Gersh corroborated the receipt of large cash sums from petitioner through the mail, he testified they were sent to him to buy coin machines and that he returned the money. Wolcher's evidence to impeach Gersh's coin machine explanation was held erroneously rejected. Corriston's newly discovered evidence is more important than an impeachment of Gersh's "coin machine" explanation, since it affirmatively corroborates petitioner's account that the purpose was for whiskey black market payments.

With Corriston's corroboration of petitioner as to purpose, petitioner is able to call Gersh to identify the bank records corroborating the cash mailings without being trapped by the fact that petitioner's testimony as to purpose would be contradicted by Gersh, a fundamentally hostile witness, and would not be corroborated by any one else. And as already noted Corriston corroborates petitioner's testimony (denied by Gersh) of $60,000 paid to Gersh in November 1943.

3. At the second trial the jury recommended leniency even though the prosecutor tellingly pointed out to the jury that there was nothing but petitioner's unsupported word to show that he had sent any cash to Gersh, or that Gersh was in any way involved in the whiskey black market. (R. 14919, pp. 7-8.)

At a new trial petitioner could provide corroboration not only as to the purpose of his payments to Gersh, but also to amounts paid to Gersh equal to the vast bulk of petitioner's black market receipts to be accounted for.

Obviously it would be unjust to speculate that with such corroboration the jury would nevertheless convict petitioner, whose tax return showed income of

$66,950, because the corroboration, though extensive, does not extend to every dollar of payment testified to by petitioner, such as the $3,000 cash delivered to Gersh in 1944. That was not the basis on which conviction was obtained. The corroboration of the main points and great bulk of petitioner's testimony obviously supports his testimony as a whole. The extensive corroboration would at a minimum negative guilt beyond a reasonable doubt.

Because of its erroneous factual assumptions, the court of appeals misunderstood the significance of the newly discovered evidence in the total setting of the evidence available at a new trial. In Judge Chesnut's phrase, the newly discovered evidence would be "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld*, 111 F. Supp. 919, 923 (D. Md. 1953.)

In view of the erroneous underlying assumptions, the court's factual discussion is no bar to the issuance of the writ to review the important legal rulings on the admissibility of the evidence tendered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD LEVENTHAL,
LEO R. FRIEDMAN,
Attorneys for Petitioner.

July 14, 1956

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,919

May 15, 1956

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: HEALY, ORR and POPE, Circuit Judges.
ORR, Circuit Judge:

This case has been before us on two previous occasions. For a detailed statement of the facts we refer those who may be interested to 200 F.2d 492 and 218 F.2d 505. The case is now before us on appeal from a denial by the trial court of a motion for a new trial on the ground of newly discovered evidence.

We approach the consideration of this appeal with the thought in mind that, "a trial judge's order denying a motion for new trial on the ground of newly discovered evidence, should remain undisturbed 'except for most extraordinary circumstances,' United States v. Johnson, 327 U.S. 106, 111."[1]

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[1] The quotation is from the opinion of Mr. Justice Douglas, filed December 31, 1955, accompanying an order granting bail pending appeal in the instant case.

The defense relied on by appellant to the charge made in the indictment of failing to report profits alleged to have been made in the course of black market liquor operations was simply that *he made no profits*. While freely admitting that he collected large sums "under the table" in excess of the legitimate O.P.A. prices appellant testified that he paid out all over ceiling prices collected in order to obtain black market liquor. The over ceiling money collected by appellant, so he testified, was paid to one Gersh, who, appellant claimed, acted as Wolcher's agent in obtaining liquor.

Two affidavits were presented to the trial court in support of the motion for new trial. One Edwin Corriston deposed that he was in the business of operating "amusement machines;" that he was an old friend of appellant and said Gersh; that in the spring of 1943 he met Gersh in New York City and Gersh then and there told him that he, Gersh, was looking for a contact in the liquor business who could obtain black market liquor for appellant; that he, Corriston, suggested contacts to Gersh and on one occasion witnessed payment by Gersh to one such contact of $10,000 as part of a black market liquor purchase; that he, Corriston, did not reveal his knowledge of the transactions to appellant until after the second trial because of his reluctance to get involved in a criminal case.

Appellant contends that the new evidence outlined in the affidavit if introduced in a new trial would corroborate Wolcher's testimony in a vital aspect of the case, to wit, that Wolcher did remit to Gersh moneys to be used in the purchase of black market liquor.

One important reason such alleged newly discovered evidence is insufficient to move the trial court to exercise its discretion in favor of granting a new trial is that such evidence would be inadmissible for the purpose intended, although appellant argues strenuously to the contrary. That the alleged testimony on its face is hearsay is conceded

by appellant, but, he argues, it would nevertheless be admissible under an exception to the hearsay rule, in that it would be within the res gestae, in the sense of constituting verbal acts or verbal portions of acts. In our opinion appellant's argument stretches the exception beyond its accepted use. We think it is not an oversimplification to hold that, in applying the exception to the facts here, the line of demarcation is that if the purpose was to establish that Gersh made the statements attributed to him perhaps the exception would apply, but, as here, where the probative value lies in an attempt to establish that the statement made by Gersh was true, then the Corriston statement is hearsay.

Statements constituting verbal acts or verbal portions of acts are admissible only where the fact that the statement was made is the significant matter sought to be proved. Here, however, the attempt would be to introduce Corriston's testimony as to Gersh's statement to establish the truth of what Gersh said, which purpose is not within the res gestae exception. We find support for this conclusion in VI Wigmore on Evidence, third edition §§ 1766-1792, see particularly §§ 1772-1776.[2]

Another ground advanced by appellant as supporting the admissibility of the so called newly discovered evidence is that it comes within the exception relating to admissions of a co-conspirator in pursuance of a conspiracy. This exception to the hearsay rule, insofar as we are advised has never been allowed in favor of a defendant. It has been applied consistently in favor of the prosecution. But,

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[2] The cases on which appellant relies for his contrary contention are distinguishable: Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 involved the spontaneous exclamation rule; St. Clair v. United States, 154 U.S. 134, involved the use of a conspirator's admission against a co-conspirator; Mutual Life v. Hillmon, 145 U.S. 285 was based on the exception in favor of statements of present intent admissible to show a state of mind.

argues appellant, if evidence is admissible for the prosecution why should it not be so for the defense?

The co-conspirator's assertion doctrine has developed as a reasonable extension of the rule excepting admissions of a party from the heasay prohibitions, IV Wigmore, § 1079. As was said by the Supreme Court in the case of Lutwak v. United States, 344 U.S. 604, 617, "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party, Clune v. United States, 159 U.S. 590, 593."

The rationale of the exception is that such assertions constitute vicarious admissions chargeable against all conspirators, IV Wigmore, § 1049. As in other instances of admissions by a party or his agent acting within the scope of his authority the statements are admissible against the declarant, but it is well established that the latter may not, when it suits his advantage, avail himself of them their hearsay character notwithstanding.[3]

Other so called newly discovered evidence is detailed in an affidavit of one Murray M. Chotiner who was defense counsel at appellant's trial. Mr. Chotiner's affidavit states that he held a conference with the United States Attorney

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[3] The only case cited to us or discovered by our research in which a contention was made that admissions of a co-conspirator *uttered* in the course of the conspiracy should be received in evidence on his behalf is the case of Nothaf v. State, 91 Tex Cr. Reports 378, 239 S.W. 215. The contention was rejected. Appellant claims to find support for his contention in the law of agency wherein, he states, "It is clear that the declarations of his agent made in the course of a transaction are admissible in evidence as part of the res gestae whether offered for or against the principal. 32 C.J.S. Evidence, § 410." The cited section does not support appellant's statement. See IV Wigmore, § 1078 to the contrary.

on December 19, 1953, which date was subsequent to appellant's conviction, at which conference the United States Attorney stated in substance and effect as follows:

> "We have evidence that the money Wolcher paid to Gersh was passed on to people very high in the syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

and further,

> "If all the money collected by Wolcher were for payment of the liquor, he is innocent of tax evasion."

By counter affidavit the United States Attorney informed the court that whereas he did not recall whether or not he had made the quoted statements, if he had made them it was in the course of a conversation and in a context from which it must have been clear to Mr. Chotiner that the term "evidence" was used to refer to "all information whether the result of speculation, rumor, suspicion or otherwise . . ." rather than in the strict legal meaning of the word. The counter affidavit further asserts, and it is not denied, that a Mr. Friedman, appellant's former counsel, had been advised by the Government of the same matters at an earlier date.

On this point suffice it to say that the alleged newly discovered evidence related in the Chotiner affidavit is no more material than the alleged Corriston statement, see discussion infra. Though it be shown that "the money paid to Gersha [sic] was passed on to people very high in the syndicate who had no relation or contact with Wolcher, with very little of the money being retained by Gersh," this in no way corroborates Wolcher's testimony on the crucial point of whether Wolcher's black market operations netted a profit. Furthermore, the unrefuted statement in the United States Attorney's affidavit that he had made the same disclosure to Mr. Friedman of counsel for

appellant destroys the newly discovered claim as to said evidence.

Further, even should the matter contained in the affidavits be deemed admissible in the event of a new trial, no "extraordinary circumstances" appear as to require this court to disturb the discretion exercised by the trial judge in denying the motion. Appellant has been twice convicted. The last trial was before the trial judge who denied the instant motion.

On motion for a new trial on the grounds of newly discovered evidence it is incumbent upon the moving party to offer new matter which, if true, would probably produce an acquittal, Balestreri v. United States, 9th Cir. 224 F.2d 915, United States v. Johnson, 7th Cir. 1944, 142 F.2d 588. In assessing the probative value of proffered new evidence the district judge, if he presided at the trial of the case, may exercise his discretion in the light of the understanding of the case he gained at the trial, Balestreri v. United States, supra.

The proposed new evidence would at most corroborate appellant's story as to the disposition of but a portion of the black market money admittedly received, leaving a large amount unaccounted for except by appellant's testimony. A showing of failure to report a lesser amount than charged would support a conviction.[4] Two juries failed to credit appellant's implausible story wherein he pictures himself as a "good fellow" daily running the risk of fine and imprisonment in illegally receiving some $200,000 without any of it "sticking to his fingers," his assertion that he did so in order to obtain liquor for his own taverns, notwithstanding.

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[4] Once the prosecution has established unreported receipts the defense has the burden of producing evidence to support its claim of deductions, United States v. Bender, 7th Cir. 1955, 218 F.2d 869, United States v. Link, 3rd Cir. 1952, 202 F.2d 592.

The exercise of a sound discretion would dictate that no different result would be reached at a new trial.

Judgment affirmed.

(Endorsed:) Opinion. Filed May 15, 1956.

PAUL P. O'BRIEN, *Clerk*.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14919

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Judgment

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: May 15, 1956
PAUL P. O'BRIEN, Clerk

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. —— October Term, 1955

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA

APPLICATION FOR BAIL

[December 31, 1955]

Mr. Justice Douglas, Circuit Justice

Wolcher has been sentenced to two years' imprisonment and fined $10,000 on a judgment of conviction of federal income tax evasion. The judgment has been affirmed by the Court of Appeals. 218 F. 2d 505. A motion for a new trial based on newly discovered evidence was denied by the District Court and an appeal from that order is now pending in the Court of Appeals. The District Court and the Court of Appeals have denied bail pending that appeal. Wolcher now makes application for bail to me as Circuit Justice. Rule 46(a)(2) of the Rules of Criminal Procedure authorizes me to grant the application "only if it appears that the case involves substantial question which should be determined by the appellate court." See *Herzog* v. *United States*, 75 S. Ct. 349.

A trial judge's order denying a motion for a new trial on an appraisal of newly discovered evidence should remain undisturbed "except for most extraordinary circumstances." *United States* v. *Johnson*, 327 U.S. 106, 111. Nevertheless, after hearing oral argument and studying the record, I feel that the appeal raises "a substantial question" within the meaning of Rule 46(a)(2), if that

Rule is given the liberal construction necessary to protect the right of appeal. See *Herzog* v. *United States*, *supra*.

The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as overceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. If the district judge denied the motion because he considered the Corriston testimony to be of too little weight in the totality of the trial to justify a new trial, his judgment that a new trial was not "required in the interest of justice" within the meaning of Rule 33 of the Rules of Criminal Procedure, would be entitled to special deference. He stated that in his opinion the motion failed to set forth any "legal basis" for granting a new trial. The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established. The district judge may, on the other hand, have meant that the Corriston testimony was inadmissible, because it was hearsay. Counsel for Wolcher argue that the Corriston testimony would be admissible even though it was hearsay, because it relates to statements of Gersh made in furtherance of a conspiracy between Wolcher and Gersh to obtain black market whiskey—a novel suggestion since those statements would be made on behalf of the co-conspirator rather than against him. Yet it is claimed that the agency theory which admits the statement when it hurts the co-conspirator (see *Lutwak* v. *United States*, 344 U.S. 604, 617, and cases cited), likewise makes it admissible when it aids him. If, as appears to be the case, the denial of the motion for a new trial by the district judge was at least in part a ruling

on a point of evidence, a "novel" question, within the meaning of *Herzog* v. *United States, supra,* at 351, is presented. If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail.

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Office - Supreme Court, U. S.
FILED
MAY 13 1955
HAROLD B. WILLEY, Clerk
Office - Supreme Court, U.S.
FILED
JUL 13 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES, *Respondent*

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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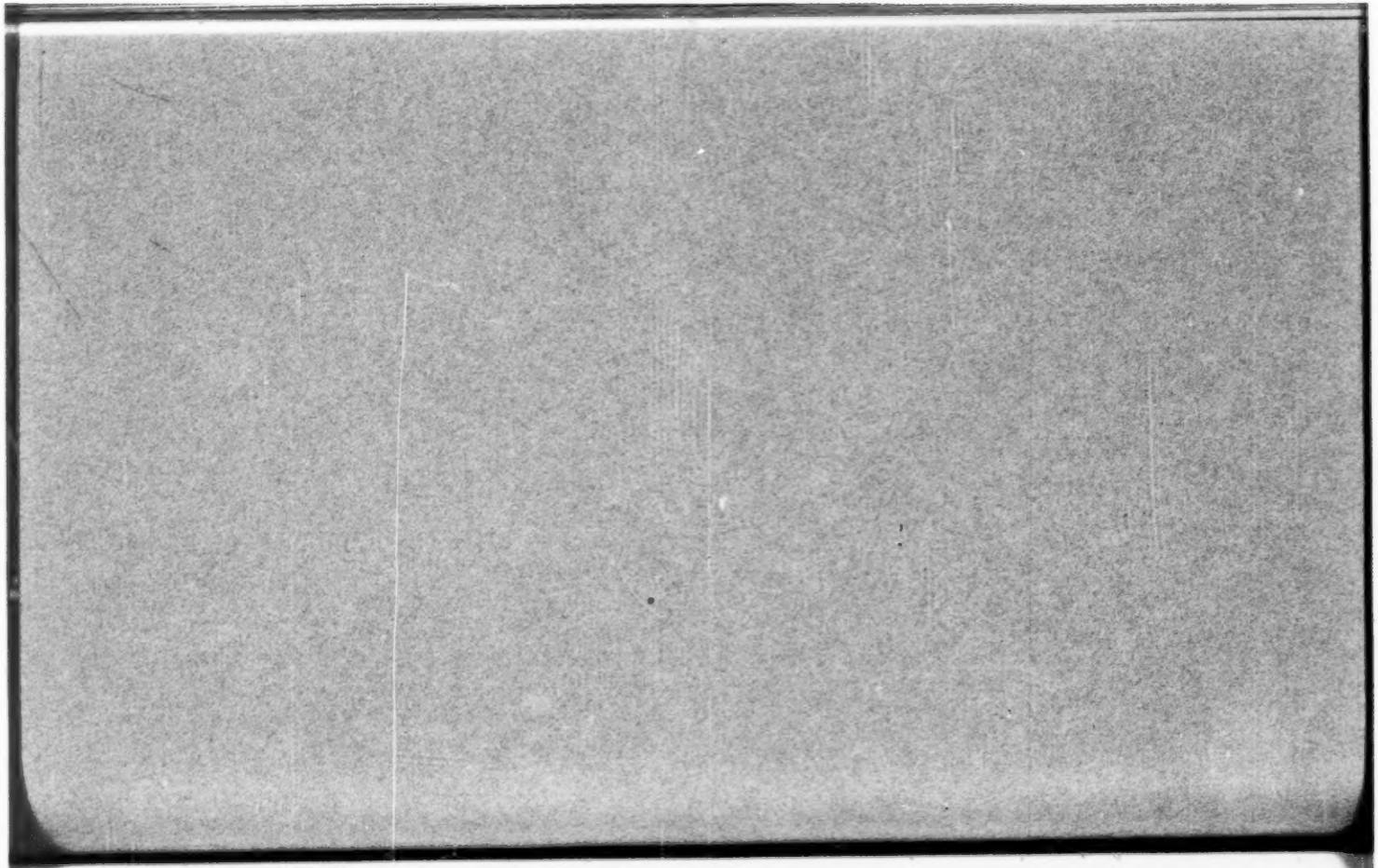

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,109
Dec. 28, 1954

LOUIS E. WOLCHER, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

BEFORE: HEALY, ORR, and POPE, *Circuit Judges*
HEALY, *Circuit Judge*

This matter is before us on appeal from a judgment of conviction on a charge of attempted income tax evasion.

Appellant had earlier been convicted on the same charge, and we reversed for error committed in the course of the trial. Wolcher v. United States, 200 F. 2d 493. The background of the case is rather fully developed in that opinion, and we shall here touch but briefly on the evidence. During the tax year involved (the fiscal year ending June 30, 1944) appellant collected large sums from the sale at wholesale of whisky at overceiling prices. Wolcher himself was not a wholesaler of whisky, but operated or was interested in a number of taverns or bars. The sales in question were made through San Francisco liquor wholesalers. The purchasers gave checks to the wholesalers in the amount of the ceiling price and paid the overceiling price in cash directly or indirectly to Wolcher. Wolcher reported no income from the sales.

The government through various witnesses established the details of these transactions, and Wolcher himself admitted them while on the stand. He contended only that he made no profit from the operations for the reason that in acquiring whisky he himself was obliged to make overceiling payments to one William Gersh in amounts which approximately offset the cash paid him by the buyers. At the former trial Gersh testified for the government that the large sum of money sent him by Wolcher was to be in

payment for coin machines which Gersh thereafter attempted unsuccessfully to buy for Wolcher. He said the money was returned except for a minor amount spent in acquiring for Wolcher a number of phonographs. Gersh did not testify on the second trial.

The sufficiency of the evidence to sustain the conviction is not disputed. What is claimed is that certain prejudicial errors were committed on the trial. The assignment most heavily relied on is an alleged error in the giving of an instruction. During the course of a lengthy charge to the jury the court said: "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

It is argued that the instruction shifted the burden of proof from the government to appellant; that it took from the jury the question of whether the government's evidence established the charge beyond a reasonable doubt; that in effect it told the jury to disregard all other evidence in the case save the testimony and story of the defendant and to decide his guilt or innocence solely upon his testimony; and that it told the jury to discount or ignore weaknesses in the government's case if the jurors found appellant's testimony to be unworthy of belief.

Naturally the propriety of the instruction is to be considered in context. In the course of its charge the court gave the jury the following instruction: "The presumption is that the defendant is innocent and that presumption continues until such time as the Government has proved the guilt of the defendant beyond a reasonable doubt. The Government has the burden of proving the guilt of the defendant. That burden never shifts at any stage of the proceeding to the defendant. The defendant has no obligation of any kind to go forward and prove that he is innocent."

In immediate connection with the passage under attack, and as preliminary to it, the court gave the instructions shown on the margin.*

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*"The indictment in this case charges the defendant with wilfully and knowingly attempting to defeat and evade a large part of his income tax for the fiscal year ending June, 1944. The amount by which his net income is alleged to have exceeded the amount he reported on his return was approximately $45,000, as alleged in the indictment. The indictment was filed pursuant to a federal statute which makes it a criminal offense for any person to wilfully attempt in any manner to evade or defeat any tax imposed by the revenue laws of the United States. Now the defendant plead not guilty to that charge, and so that's the issue. Did he wilfully and intentionally attempt to evade the payment of income taxes due the United States for this fiscal year ending in June, 1944?

"Now the Government has the burden of proving that the defendant had taxable net income which he did not report, and that his act in so doing, failing to report it, was wilful and intentional.

"Now what do we mean when we speak about net income? Well, there is of course a very simple definition of it. Most of the men on the jury, I think, have heard it stated—maybe the ladies not so often, unless you are following some occupation—that it means the gross income, the total income that a man has, less the deductions or expenses or expenditures that the law says he can take from it; then what he has got left is his net income. Now that's what the defendant is charged in this case with non-payment of, is the net income. Now the taxable income of an individual includes anything by way of a gain or profit or income that he might get from salaries or wages, business, compensation for personal services, from trade or business, or sales or dealings in property; and it also includes any profit or income, net in character, that a man would obtain from any illegal transaction as well as a legal transaction. He has to account for all of his net income to the United States.

"Now it is not necessary for the Government to prove the exact amount of the evasion, if any, nor the exact amount charged in the indictment. It would be sufficient if the Government shows that a substantial amount of money, consisting of net income, was wilfully evaded by the defendant in the case.

"Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respectively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant

We think in the circumstances and in the light of the accompanying instructions the jury could not rationally have understood the particular passage as shifting the burden of proof to the defendant, or as authorizing them to disregard frailties in the government's proof. As already said, the government had shown and the appellant had admitted that in the course of his liquor transactions during the tax year under inquiry he had received large sums in cash which he did not report as income. Obviously in such condition of the record he had some explaining to do; and as the court indicated, he undertook specifically to show that the cash did not represent a profit because he had to pay out equivalent sums as overceiling acquisition cost.

The government had clearly established a prima facie case. Several of the circuits have held in prosecutions for

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admitted that he received, were income and were net income, and that the whisky was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention.

"The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute.

"So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

income tax evasion that when a prima facie case has been made out the burden of going forward with evidence is on the accused. United States v. Stayback, 212 F. 2d 313, 316-317; United States v. Smith, 206 F. 2d 905, 910; United States v. Link, 202 F. 2d 592, 593-594; United States v. Hornstein, 176 F. 2d 217, 220. The holdings appear well grounded. In this instance, however, the court instructed the jury that no duty of going forward rested on the accused, and we think it unnecessary to consider whether the decisions mentioned should be followed here. If the jury were convinced beyond a reasonable doubt that there was no truth in appellant's defense, then, certainly, as the court advised them, they were justified in returning a verdict of guilty. In sum, the instruction did not impose on appellant the burden of going forward. On the contrary, it left upon the government the onus of disproving his affirmative defense beyond a reasonable doubt.

The claim that the jury were told to disregard all evidence other than the testimony of the defendant himself presents a different question. It is pointed out that other witnesses had given testimony of a nature corroborative of the defendant—principally in respect of the great difficulty of obtaining whisky at the time other than on the black market; and it is said that in effect the jury were instructed to disregard these corroborative circumstances.

We think the point is without force. The problem confronting the jury was not whether whisky was difficult to obtain or whether appellant was able to obtain it. Admittedly he did obtain the whisky in question, albeit at what he said was a heavy overceiling price. The instruction could hardly be understood by the jury as telling them to disregard these, or other circumstances in evidence, which might tend to corroborate appellant's account of his transactions or the asserted necessity of his paying overceiling prices. The choice of the term "his story" may not have been a happy one, but we think in the framework of this case the term would naturally be understood as having reference to appellant's defense as a whole, including whatever corroboration it might have in the testimony of others or in the circumstances in evidence.

The second specification of error is the refusal of the court to give a requested instruction reading as follows: "in determining whether the defendant made any profit on his purchases and sales of whisky, you must determine, from all the evidence in the case, the actual amount the defendant paid for the whisky and the actual amount the defendant received for the whisky; in determining what amount the defendant paid for any whisky involved in this case, you must add to the actual cost of said whisky, any amounts of money, if any, that Wolcher paid to any person as a bonus or commission or fee for procuring such whisky for him."

The proposed instruction was on its face misleading and there was no error in refusing to give it. The jury were not required to determine the "actual amount" the defendant paid for the whisky or the "actual amount" received for it. It was enough if he were found to have received net income which he failed to report. The instructions actually given sufficiently covered the general subject.

Another error claimed is the ruling of the court on a question asked appellant regarding a conversation he had with William Gersh, when, as he said, he approached the latter in the spring of 1943 for the purpose of acquiring the whisky. The government objected to the interrogation as calling for self-serving or hearsay testimony, and the court sustained the objection.

A sufficient answer to the assignment is that the substance of the conversation was actually related by Wolcher, and is in the record. He testified that at that time he had a conversation with Gersh with respect to obtaining whisky, and that Gersh told him he (Gersh) had friends in the liquor business who could get it for him; that in the conversation Gersh mentioned the necessity of paying an overceiling price. Wolcher testified, of course, to the details of his asserted transactions with Gersh, the amounts of money he had sent the latter, the quantity of liquor received from him, and the amount of the overceiling price he had to pay him. Those, rather than details of conversations preliminary to them, were the essential matters Wolcher needed to get before the jury. Appellant made

no offer of proof with respect to further items of the alleged conversation which might have been thought material. We think the ruling of the court in this respect was not prejudicial, and certainly it was not reversible error.

Finally it is claimed that the court erred in refusing to reopen the trial after the parties had rested, in order that appellant might call Gersh as a witness. Appellant was familiar with Gersh's testimony given at the former trial. He had had opportunity to subpena Gersh and knew where he lived. He claims that he was not aware of the presence of the witness in San Francisco until shortly before the time of making the request for a reopening, and he suggests that he had a right to rely upon the government to call Gersh. We think otherwise. Under the circumstances the court's refusal to reopen was well within its discretionary authority. Cf. *Horowitz* v. *United States*, 5 Cir., 12 F. 2d 590; *Brink* v. *United States*, 6 Cir., 60 F. 2d 231.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 28, 1954. Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12,992

Nov. 17, 1952

LOUIS E. WOLCHER, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court,
Northern District of California, Southern Division.

Before HEALY, ORR and POPE, Circuit Judges.
POPE, Circuit Judge.

The appellant was convicted under an indictment charging that he wilfully and knowingly attempted to evade and defeat some $30,000 of the income and victory taxes due and owing by him for the fiscal year ending June 30, 1944, in violation of § 145b of the Internal Revenue Code. The questions presented on this appeal all relate to claimed errors in admitting and excluding evidence. It is therefore necessary to state only enough of the facts to indicate the significance of the evidence rejected or admitted over objection.

The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whiskey from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above described were) except for an item of $3,000 profit made on a transaction not involved here.

Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in

purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called "The Cash Box" devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person.

Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher.

Wolcher's version of the $5250 purchase which Gersh made was that he Wolcher, had seen in a coin machine industry publication known as "The Billboard" an advertisement offering these machines for sale, and that he had sent a letter ordering them. He said that since the sellers wanted a deposit on the deal he telephoned to Gersh to make the deposit for him out of the money which Gersh had received from him and then had on hand, and that this is how Gersh happened to put up the $5250 on these machines. He testified that there was no shortage of coin machines; that during the year he purchased hundreds of thousands of dollars worth of such equipment; that al-

though the only equipment of that character then for sale was used equipment, yet it was advertised for sale in large quantities.

Wolcher was asked on cross-examination: "Did you make the statement to Mr. Kirby that you were making in excess of $20 a case on all whiskey which you sold? He answered that he did not recall making such a statement. Thereafter Kirby was called and testified that in the latter part of 1942 or the first part of 1943 he had a conversation with Wolcher relative to the liquor transactions. He was asked to relate the conversation. The witness was permitted to answer, over objection, but was able to recall only that there was "a conversation of approximately $20 a case profit". The Government then produced a statement which Kirby had made in writing in 1948 at the instance of an agent of the Revenue Bureau. He was permitted to examine it and then was asked if on such examination his recollection as to the conversation inquired about had been refreshed. He replied in the negative. He then testified that when he had made the statement, the matter was then more fresh in his recollection than it was now. Thereupon the statement was offered and received in evidence over the objection of the defendant, upon statement of counsel for the government that it was offered as his "past recollection recorded". The objection was both that it was not a proper mode of impeachment, as well as that it was hearsay and otherwise not competent.

The document thus received was in question and answer form and contained the statement that Kirby had a very poor memory but that he would guess that the conversation took place in 1943, and at that time Wolcher, talking to Kirby about shipments of whiskey, stated that his profit "was estimated at $20 a case. That is the estimate of profit would be $20 a case."

This 1948 statement purporting to describe a conversation in 1943, should not have been admitted. We do not discuss the question of the propriety of attempting impeachment in the unusual manner here employed, for we think that since Wolcher was the defendant a statement of a material fact, not amounting to a confession of guilt,

if properly proven, would be admissible as an admission of an accused defendant.[1]

The statement was incompetent and inadmissible for two reasons: Such a memorandum when used as past recollection recorded, where the witness "has no recollection of the facts stated in it", must have been made "while the occurrences mentioned in it were recent and fresh in his recollection". Maxwell v. Wilkinson, 113 U.S. 656, 658. The recording, in 1948, of something said to have happened in 1943, was not sufficiently fresh and vivid to be probably accurate. This memorandum failed to measure up to any of the usual requirements of trustworthiness.[2] Furthermore, the statement was not properly verified by the witness. He did not testify that at the time he made the written statement he then knew it to be true. All that he said was that at the time the statement was made his recollection was fresher than it was at the trial. Its assertions were vouched for by no one.

During the taxable year in question Wolcher had been a member of a partnership known as "The Gold Coast" which was engaged in the sale of liquor by the glass. The business and the income of this partnership had nothing to do with the charge in this case.[3] The Government called as one of its witnesses an accountant who had been employed by Wolcher to prepare a partnership tax return for The Gold Coast for the fiscal year ending July 1, 1944. He produced a working copy of the return he had prepared. This return was never filed and differed materially from the return of the Gold Coast which was actually filed. In the return which the witness had prepared the inventory of the Gold Coast was shown to be some $31,000 whereas the return actually filed showed a much smaller

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[1] Dimmick v. United States, (9 cir.) 116 F. 825, 831; Ercoli v. United States, (CADC) 131 F. 2d 354, 356; see Wigmore on Evidence, § 821, note 4, and § 1039, note 2.

[2] The cases are collected in Wigmore on Evidence, 3d Ed., § 745.

[3] It did appear that some of the whisky from which Wolcher is claiming to have made the profits here in question was sold by or through him to the Gold Coast.

inventory, some $16,500. The working copy of the partnership return thas prepared by the accountant was received in evidence over appellant's objection.

It was conceded by the Government that the Gold Coast return was not involved in the case because any profit shown thereon would not be included in Wolcher's return for the year here in question. It was offered and received by the court on the theory that its purpose was to show "wilfullness and intent".

When there is proof that an act has been done and the question arises whether it was done with criminal intent, other similar acts by the accused may be proven for the purpose of demonstrating that he was acting at the time alleged in the indictment with criminal intent and volition. In such cases the fact that the prior acts may themselves be criminal in character does not exclude them.

At the same time we must bear in mind that the commission of a wrongful act charged cannot ordinarily be established by proof that the defendant has previously committed other wrongful acts. It is fundamental that such a method of proof is inadmissible merely for the purpose of showing that the defendant has a generally criminal disposition or character.[4] Hence, if in order to prove intent, evidence is to be received of other wrongful acts, the acts thus proven must be of such character that as a matter of logic they tend to demonstrate a criminal intent at the time of the commission of the act now charged For one thing the prior acts must be similar to the one now charged.[5]

The caution which the courts must exercise in such cases is well set forth in Boyer v. United States, (CADC) 132 F. 2d 12, 13. In that case, while the prior act proven was similar to that charged, the receipt of the proof of the prior act was held to be error because it occurred nearly two years before the date charged in the indictment. The general rule relating to admission or exclusion of evidence of such acts was stated as follows (p. 13): "In various

[4] See the cases cited in Shea v. United States, (6 cir.) 236 F. 97, 104.

[5] Cf. Wigmore on Evidence, 3d Ed. § 302.

circumstances, therefore, evidence of earlier acts good or bad may be admitted, as tending in one way or another to show a man's state of mind, when he is charged with a later fraud. But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are "so connected with the offense charged in point of time and circumstances as to throw light upon the intent."

In the case before us the circumstances relating to the preliminary draft of the partnership return were in no way connected "in point of circumstances" with the offense charged in the indictment. The only resemblance between the two sets of acts would be that both had to do with tax returns. But the partnership return was of an entirely different nature from the transaction for which the defendant was here on trial. The evidence relating to the partnership was not logically relevant either to prove or disprove the intent or knowledge of Wolcher in connection with his performance of the acts shown at the trial and charged in the indictment.

There is complete lack of proof that the accountant's tentative partnership return was correct, or that the partnership return actually filed was not. But in the circumstances it must have been offered on the theory that the change from the larger inventory in the preliminary draft, to the smaller in the return as filed, meant that some act of chicanery was afoot. The jury would be apt to place that construction on it, and were thus invited to infer that the failure to include the tentative inventory in the final partnership return was a wrongful act. Upon this unwarranted assumption they were further permitted to infer defendant's guilt from the fact of a prior unrelated, dissimilar wrongful act. As stated in Boyer v. United States, supra, (p. 13) "No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise, and confusion of issues is thought to outweigh its probative value. The law seeks 'a convenient balance between the necessity of obtaining proof and the danger of unfair prejudice.' The alleged fact that a man committed one forgery

clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible." We hold that it was error to admit the working copy of the Gold Coast partnership return in evidence.

What we have said applies also with respect to an inventory which the accountant had prepared to accompany the working copy of the partnership return. In addition, it is noted that there was no evidence that the values attached to the inventory were correct or where they were obtained. They may have been gleaned by inquiry from miscellaneous persons who may or may not have been qualified to state values. None of these persons was called. The instrument was wholly without foundation. Compare United States v. Kelley, (2d cir) 105 F. 2d 912, 917.

The court also admitted in evidence a paper or memorandum obtained by a Government special agent from Wolcher's office files. The paper was dated February, 1936, and was a carbon copy of a purported note sent to the Seattle office of Wolcher's business. It bore the initials "L.E.W." and "E.C." It contained language to the effect that the writer or writers "should like to receive a check from you very soon against our private account, so that we can show a similar profit in the coming year and perhaps make considerable more money". The paper was wholly without foundation; there was no proof of its genuineness or who wrote it, or that it was a document made in the regular course of business, or otherwise. Its receipt over appellant's objection was error.

After the witness Gersh had testified on rebuttal that the sums he received from Wolcher were sent to him because coin machines were very difficult to purchase and could only be obtained by one armed with the full cash price, Wolcher testified on surrebuttal that at the time in question coin machines were plentiful and easily purchased and that they could be purchased on time. For the purpose of corroborating his testimony in this respect he offered in evidence volumes containing all weekly issues of the "Billboard" for the year here in question. These issues contained numerous advertisements of offers to sell

coin machines on terms permitting down payments of substantially less than the full amount of the price. The evidence showed that the "Billboard" was a national publication and a trade paper specializing in this sort of information. They were excluded as immaterial.

It is generally held that the state of the market in securities or commodities may be proven by reports or quotations in newspapers and trade journals.[6] If the market in coin machines at the time in question was as claimed by Wolcher, the existence of the numerous offers to sell here sought to be proven would tend to corroborate Wolcher's testimony. We think that the offered evidence should have been received.

For a like purpose Wolcher offered in evidence correspondence between himself and a New Jersey company which was engaged in the business of selling similar machines. The correspondence was offered for two purposes. One was to show that the particular purchase of phonographs to which Gersh had testified had actually been negotiated by Wolcher himself and not by Gersh as the latter claimed. The second was to disclose that the coin machines were readily available without the necessity of cash in advance as Gersh had testified. The court refused to admit this evidence.

We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted.[7]

Among the items of bonuses which Wolcher testified he had to pay in order to get whiskey during the year in question was a bonus or under-the-counter payment to one Worthy made to procure some 500 cases of whiskey furnished to the Gold Coast. Wolcher sought to show that

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[6] Numerous cases are collected in a note at 43 A.L.R. 1192.

[7] In Caten v. Salt City Movers & Storage Co., (2d cir.) 149 F. 2d 428, 433, the court held that the trial court had properly admitted in evidence a letter received from a dealer in the type of merchandise there in question. The letter was received as evidence of the values as stated in the dealer's letter.

this particular payment was occasioned by the fact that the quantity then procured was an especially large one and one very difficult to secure in the condition of the market for whiskey at that time. To show that there was a special reason for the demand and the payment of the bonus, Wolcher sought to prove by an employee of the seller that the particular purchase was very much out of line with the ordinary purchases of Gold Coast or by the Silver Rail, another liquor selling place in which Wolcher had an interest. This evidence was excluded.

It would appear that the size of the purchase and its relation to the purchases commonly made for this place would be a part of the circumstances then present likely to throw some light upon the probability or improbability of Wolcher's statement.

The question remains whether these erronous rulings were prejudicial. If they were to be considered singly, each by itself, the situation might be different. Thus the exclusion of the evidence that the purchase of liquor on account of which Wolcher claimed to have paid a $10,000 bonus to Worthy was disproportionate in amount and value to other sales to the Silver Rail and the Gold Coast, might not be prejudicial in view of the fact that the witness Grusenemeyer testified to substantially the same matter. The evidence thus excluded might well be regarded as merely cumulative, and therefore its exclusion not prejudicial.

But with respect to the remaining erroneous rulings, when we consider them all together and in the light of the sharp conflicts of testimony which were left to be resolved by the jury, we cannot disregard the errors committed as without probable substantial influence upon the verdict of the jury. The rule which we endeavor to apply is that stated in Kotteakos v. United States, 328 U.S. 750, 764: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps when the departure is from a constitutional norm, or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the

whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We cannot say that these errors are those which "do not affect substantial rights" and hence that they should be disregarded.[8] The errors here listed require a reversal since in our judgment "the error might have operated to the substantial injury of the defendant" United States v. Grady, (7 cir.) 185 F. 2d 273, 275.

The judgment is reversed and the cause is remanded with directions to grant the appellant a new trial.

(Endorsed:) Opinion. Filed Nov. 17, 1952. Paul P. O'Brien, Clerk.

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[8] Rules Criminal Procedure, 52a.

APPENDIX C

TRANSCRIPT OF RECORD

No. 12992

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

NOTE: A copy of the transcript of record in No. 12992, duly certified by the Honorable Paul P. O'Brien, Clerk, has been lodged with the Clerk of the United States Supreme Court together with the Transcript of Record on the second appeal, No. 14109.

The following excerpts are set forth in this Appendix C for convenience.

The page references in brackets [p.] are to the printed Transcript of Record, No. 12992, on appeal. Page references to the original typescript of record have been omitted.

[p. 557]

* * * * *

WILLIAM GERSH

called on behalf of the Government in rebuttal, sworn.

Court: Q. Your full name? A. William Gersh.

Q. Spell your last name. A. G-e-r-s-h.

Q. And your business or occupation? A. Publisher, magazine.

Q. Publisher? A. Publisher.

Q. What magazine? A. The Cash Box Magazine.

The Court: Cash Box. Proceed.

Direct Examination

By Mr. Campbell:

Q. Now if you will keep your voice up, Mr. Gersh, so that all of us can hear you? What is the [p. 558] nature of

the magazine which you publish? A. Covers the coin machine business.

Q. In other words, it is a trade publication? A. Yes, sir.

Q. And where is the office of that magazine? A. New York City.

Q. How long have you published it? A. Since '42.

Q. Are you acquainted with the defendant here, Louis Wolcher? A. Yes, sir.

Q. How long have you known him? A. About fifteen years.

Q. Over that period of time, have you had any business transactions with him? A. Yes, sir.

Q. I will ask you, Mr. Gersh, whether at any time you ever assisted him in the acquisition of whiskey? A. No, sir.

Q. Did you ever at any time introduce him to anyone for the purpose of his being able to acquire whisky? A. Not to my knowledge, sir.

Q. Are you acquainted with a man by the name of Frank Mayer? A. I don't remember that name; don't ever remember meeting him.

Q. Have you yourself had any transactions of any kind wherein large quantities of whiskey by cases have been acquired either for yourself or anyone else? A. No, sir.

Q. With particular reference to the year 1943, did you handle any money belonging to the defendant Louis Wolcher? A. Yes, sir.

[p. 559] Q. And in what amounts? A. Well, there was the entire total amount, was $85,000.

Q. And what was the reason, the purpose, for which you were handling that money? A. I was to obtain coin machines whenever and wherever possible.

Q. And what was the reason, the purpose, for which you were handling that money? A. I was to obtain coin machines whenever and wherever possible.

Q. Prior to 1943, had you handled money for Mr. Wolcher in that connection? A. Not that I remember, sir.

Q. Was that the only period of time in which you did? A. Yes, sir.

Q. Did you obtain any coin machines for him? A. Yes, sir, I did.

Q. Do you recall at this time how many and in what amount? A. Well, I bought ten phonographs for him, amounting to about $5,250, and I think there was $2,000 involved in parts, or something in there, and that was—that is all I remember at this time, sir.

Q. What was done with the balance of the money which he sent you? A. It was sent back to him by check.

Q. Now, there has been some testimony here that on June 15th, 1943, he sent you a check in the amount of $5,000. Do you recall that? A. Yes, sir, he did.

Q. And do you recall the purpose for which you received it? A. Yes, sir, at the time I was supposed to buy some equipment.

[p 560] Q. Did you purchase that equipment for him? A. No, sir, wasn't able to obtain it, and I returned the money to him.

Q. How soon did you return the money after you received it? A. Returned it the same day.

Q. And in what form did you return it? A. I think it went back to him in cash, sir.

Q. How did you happen to send it back to him in cash? A. Those were his instructions.

Q. There has also been evidence here as to a draft of $30,000 dated November 3rd, 1943. Defendant's Exhibit E: I will ask you if you saw the original of that particular document? A. Yes, sir, I did.

Q. When did you see that? A. Mr. Wolcher came to my office—

Q. In New York City? A. In New York City.

Q. Do you recall on what date? A. I think it was the—well, I think it was on the 4th, around that time. I don't remember the exact date, now sir. Or I could—if I could remember it, I could refer to it.

Q. All right. A. But he came to my office with this check and asked me to come down to the bank and cash it for him.

Q. Did you go to the bank with him? A. Yes, sir, we went downstairs to the bank.

Q. What bank did you go to? [p. 561] A. Corn Exchange National Bank.

Q. And what branch? A. It is known as the Fourth Avenue Branch.

Q. And who did you see there? A. Well, we went up to the, I went up to the teller's window here, I think and handed him the check, and I think they turned it over to the manager or assistant manager or whoever he was, the branch manager.

Q. Do you recall his name? A. No, I don't recall his name, sir.

Q. Does the name Requa—is that familiar to you? A. Requa—yes, sir, that is familiar to me.

Q. Is that the gentleman you saw on that occasion? A. I wouldn't be certain, sir.

Q. I see, all right. Now Mr. Wolcher was with you on that occasion? A. Yes, sir.

Q. All right, relate what occurred. A. Well, he asked for thousand dollar bills, and I put the check over to the man there, and he said that in the first place they didn't have that many thousand dollar bills, and in the second place they wouldn't issue it until they had cleared the check or draft, whatever it is, and then I asked them, then he said he wanted it deposited to my account.

Q. Who said that? A. The manager there. So I signed the back of it and put it into my account, and they gave him up to what my account could stand, which I think at that time was $10,000—ten $1,000 bills.

[p. 562] Q. Who was that given to? A. That was given to Mr. Wolcher.

Q. In your presence? A. Yes, sir.

Q. All right, what happened to the other $20,000 represented by that check after it cleared? A. Well, about three

or four days later, Mr. Wolcher called me up and asked me to meet him at the bank, which I did, and we went down to the bank and withdrew a check for the balance of $20,000, which was due him, and he got twenty $1,000 bills.

Q. Do you have your bank statements with you, Mr. Gersh? A. Yes, I do.

Q. And do they show the withdrawal of $10,000 and the $20,000? A. Yes, sir.

Mr. Friedman: Well, I will object to that: the bank statements are the best evidence.

Q. (By Mr. Campbell): I am going to ask you to produce them at this time, the statements as of November the—of November of 1943. A. (producing).

Q. This sheet which you have handed me is the original sheet received by you, a transcript of the Cash Box account with the Corn Exchange? A. That's right.

Q. For the month of November, 1943? A. Yes, sir.

Mr. Campbell: I will offer this in evidence at this time.

The Court: Let it be admitted and marked next in order. [p. 563] The Clerk: Government's Exhibit 37 admitted and filed in evidence.

(Whereupon bank ledger sheet for November, 1943, for the Cash Box, identified above, was thereupon received in evidence and marked Government's Exhibit No. 37.)

Q. (By Mr. Campbell): I call your attention, Mr. Gersh, to the fact that on November 8, 1943, there is shown a withdrawal of $10,000 and a deposit of $30,000, and on November 12th, a withdrawal of $20,000. Are those the items to which you refer? A. Yes, sir.

Q. Now, aside from the original $5,000 and the $30,000 referred to here, what other sums did you receive from Mr. Wolcher? A. Well, at one time there, he sent me about $3,000 or $3,300, and we couldn't do anything with it. I know it was sent for some specific purpose, some machine that was advertised, or machines, and where he just couldn't get them, and we immediately sent it back.

Q. Yes, Do you recall other items that he sent to you? A. Yes, sir, he sent me $5,000 later on, and we sent that back to him within a few days, and then he sent $12,500 at one time. I don't remember the exact date. And we sent that back to him. We couldn't do a thing for him at that time.

Q. Did he also on any occasion deliver to you $30,000 in cash? [p. 564] A. We received a package with $30,000 in cash.

Q. Do you recall when that was? A. Oh, I think that was in '44, in January, I think—just sometime around there.

Q. Was that on or about January 4th, 1944? A. Somewhere around there, sir.

Q. For what purpose did you receive that money? A. I believe that he phoned me at the time and said something about phonographs being available.

* * * * * * * * * *

[p. 575] Q. I see. You have stated you received around $85,000 altogether from Mr. Wolcher, all of which you returned with the exception of the money used for the purchase of ten phonographs and parts, is that correct? A. That is right sir.

Q. As I understand your testimony, you received it for the purpose of purchasing coin operated machines if they were available, is that correct? [p. 576] A. That is right, sir.

Q. How was it that all this money seemingly was in cash? A. Well, at that time most of the business done in this industry was done in cash.

Q. Why was that? A. Well, very simply because shipping was very difficult, the war was on, anything that was shipped and hadn't been paid for could reach some territory and somebody would say they didn't need them at that moment, and that was the end of it.

Q. Some of the equipment was subject to seizure, too, was it not? A. Yes, sir, some of it was.

Mr. Friedman: You mean slot machines?

Mr. Campbell: Yes.

Mr. Friedman: Well, let's hear what it is.

Q. (By Mr. Campbell): Was it the custom in the trade at that time to deal entirely in cash in the purchase and sale of coin operated machines? A. Well, it wasn't the—not everybody would deal in cash. There was people that knew each other and they would send checks to each other, and so forth, but throughout the industry in view of the very hard shipping trouble that everybody had, and in view of the fact that machines were priced so far in the sky, everybody wanted to received cash. They wouldn't take a check, wouldn't take a chance on a check because they were afraid payment would be stopped after the machines were on the way, or after the machines got there somebody would say they couldn't [p. 577] use them, so they always tried to get cash to cover it up.

Q. I am going to show you several photostats of checks drawn on the Corn Exchange. Are you familiar with the original documents of which those are photostats? A. Yes, sir.

Q. That is your signature appearing on each of those checks. A. Yes, sir.

Q. Do you know where the originals of those checks are at this time? A. No, sir, I don't. The Treasury Department took them.

Q. Did you make a search for them before leaving New York? A. Yes, sir.

Q. And you were unable to find them?

Mr. Friedman: He said the Treasury Department took them.

Mr. Campbell: I understand.

Q. (By Mr. Campbell): Did you also inquire of the Treasury Department in New York if they had the checks? A. No, sir, not before I left.

Mr. Campbell: I will state that I have made inquiry of the Treasury Department and am unable to locate the

original documents. Those are the photostats of the original documents? A. Yes, those are the photostats.

Mr. Friedman: Well, since you volunteered that information, Mr. Campbell, would you mind telling me how you got the photostats?

Mr. Campbell: The documents unquestionably [p. 578] were in the possession of the Treasury Department at one time and photostats were taken.

Mr. Friedman: You got them from the Treasury Department then?

Mr. Campbell: These photostats, yes. Not from the witness.

Mr. Friedman: All right, I just wanted to know how you got them.

Q. (By Mr. Campbell): What were the checks drawn for, Mr. Gersh? A. These are all money being returned to Mr. Wolcher, so far as I can see here.

Q. I notice some of them are made to cash? A. That is right, sir.

Q. Did you send cash for those? A. Secured the cash and sent it back to him, that is right, sir.

Q. Was that pursuant to any instructions you had received? A. That is what he told me to do, the way I would receive it and send it back.

Q. So far as you know, does this represent all the money you received from Mr. Wolcher, with the exception of that spent for the ten phonographs and the parts? A. That is right, sir.

Mr. Campbell: I am going to offer these in evidence at this time as Government's Exhibit next in order, one exhibit.

Mr. Friedman: May I see them first?

Mr. Campbell: Oh, pardon me (handing documents to counsel).

[p. 579] Mr. Friedman: All right, Mr. Campbell, what is your offer?

Mr. Campbell: I offer them in evidence as one exhibit.

The Court: They will be admitted and marked next in order.

(Thereupon photostatic copies of eight checks were admitted into evidence as Government's Exhibit No. 38.)

Mr. Campbell: These checks are all on imprinted checks with one exception, of The Cash Box, Corn Exchange Bank Trust Company, Fourth Avenue Branch, New York. The first date is June 15th, 1943, payable to the order of cash, $5,000. The endorsement: "Okay to cash, Bill Gersh."

Check No. 1424, The Cash Box, August 12th, 1943, to Corn Exchange Bank Trust Company of New York; payable to cash, $3,300, signed Bill Gersh, and endorsed Bill Gersh.

Check No. 1464, August 31st, 1943, to the Corn Exchange Bank and Trust Company, pay to the order of Lou Wolcher, $5,000, signed Bill Gersh, and bearing endorsement Lou Wolcher.

Check No. 1557, October 13th, 1943, pay to the order of cash, $12,500, drawn to the Corn Exchange Bank Trust Company, signed Bill Gersh and endorsed Bill Gersh.

Unnumbered check dated November 8, 1943, to Corn Exchange Bank Trust Company, pay to the [p. 580] order of cash, $10,000, signed "The Cash Box, by Bill Gersh," and endorsement, "Bill Gersh."

Check No. 1630, dated November 12th, 1943, to Corn Exchange Bank Trust Company, New York; pay to the order of cash, $20,000, signed Bill Gersh and endorsed Bill Gersh.

Check No. 1736, dated January 13th, 1944; to Corn Exchange Bank Trust Company, cash, $7,250; endorsed Bill Gersh.

Check No. 1780, February 1, 1944, Corn Exchange Bank Trust Company, pay to the order of Advance Automatic Sales Company, $22,750, signed Bill Gersh. I find no endorsement other than the stamp, "The National N.T. & S.A."

Mr. Friedman: National Trust and Savings Association?

Mr. Campbell: Apparently. Bank clearance stamp.

Mr. Friedman: What?

Mr. Campbell: Bank clearing stamp.

Q. (By Mr. Campbell): With reference to the check which I read you of January, 1944, $7,250, drawn in cash, is that the money used in the purchase of those ten music boxes, plus the $2,000 of parts. A. Yes, sir.

Q. Now, with the exception of the two checks which I read to you, one of which was payable to Lou Wolcher and the other to Advance Automatic Sales Company, was all the balance of the money transmitted in cash? A. Yes, sir, it was.

Q. You are positive, are you, Mr. Gersh, you [p. 581] never at any time took any part in the securing or procuring of whiskey from Mr. Wolcher? A. No, sir, none.

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[p. 585]

WILLIAM GERSH

called as a witness on behalf of the Government in rebuttal, resumed the stand, previously sworn.

Cross-Examination (Resumed)

By Mr. Friedman:

Q. Well, let me hand you Defendant's Exhibit G for identification, which are the bank statements that you furnished me with just before recess. As I understand your testimony, you first received a check or a draft from Mr. Wolcher for $5,000, is that correct? A. That's right.

Q. When did you receive it? A. Oh, here's the date on here. It is June 15, 1943.

Q. Now you are now looking at your bank statement? A. Yes, sir.

Q. That is when it was deposited? A. Yes, sir.

Q. Then you say you withdrew that and sent it back to him, is that right? A. Yes, sir.

Q. What date did you withdraw it? A. The same day, sir.

[p. 586] Q. The very same day? A. Yes, sir.

Q. What was the next amount you received from Mr. Wolcher? A. Well, I think that was the $3,300.

Q. Well, now, when did you receive that? A. Oh, that is on August 12th.

Q. I see. And is that the date you deposited it in your account? A. No, that was—no, it was deposited on August 11th. I am sorry.

Q. On August the 11th? A. Yes.

Q. And when did you withdraw that amount? A. August 12th.

Q. August 12th. Now in each of these instances, when you withdraw the $5,000 on the same day you deposited it, you withdraw it by check? A. Yes, sir, I made a check.

Q. Let me hand you, so that you may refresh your memory, what is now Government's Exhibit 38, which is a set of photostat checks; referring to the $5,000, how did you withdrew it from the bank? A. Withdrew it in cash, sir.

Q. In cash. In other words, you withdrew—you drew a check payable in cash? A. Yes, sir.

Q. Did you endorse it? A. Yes, sir.

Q. That is the only endorsement it bears? A. That's right, sir.

Q. And you received $5,000 in cash for it? A. Yes, sir.

[p. 587] Q. All right. Now, as to the $3,300 check, how did you withdraw that from the bank? A. That is also withdrawn in cash.

Q. In the same way, a check that you drew to cash, indorsed and got the cash at the bank, is that right? A. Yes, sir.

Q. What is the next amount you received from Mr. Wolcher? A. Well, it is—let me see now. I think the next was $5,000 also.

Q. Yes? What date? A. I am looking for it now. Here

it is. It is—oh, that was September 7th. It is marked here. Let me see. No, it comes back here; August 31st.

Q. Yes, What date did you receive it? A. August 31st was the date it was deposited.

Q. Was that the day you received it? A. I imagine I did, sir.

Q. And how did you withdraw that? A. That was withdrawn by check, made to Lou Wolcher.

Q. Yes? A. The check is dated August 31st and sent right back to him.

Q. In other words, you received $5,000 on August 31st, you deposited it in your bank, drew a check against it and sent it right back to Mr. Wolcher? A. That's right, sir.

Q. All right. What is the next amount you received? A. Well, there is, according to this check here, $12,500.

[p. 588] Q. What date did you deposit that? A. That was deposited on October 2nd.

Q. Yes, the 2nd of October. A. That's right.

Q. And when did you withdraw it? A. October 13th.

Q. How did you withdraw it? A. Drew that in cash.

Q. That is the same as those first two cash checks—check drawn to cash, endorsed by you and you received the currency or money, whatever it was, at the bank for it? A. That's right, sir.

Q. And the next amount? A. Well, the next amount was this $30,000 check which was cashed right in the bank, their own bank check.

Q. All right. You received $30,000 and there was a $30,000 check. That was deposited on what date? In your account?

Mr. Campbell: Just a moment. That question is assuming a fact not in evidence, that he received $30,000.

Mr. Friedman: Well, he deposited it in his account. A. Yes, sir. this is the check that Mr. Wolcher brought into the bank and they forced me to draw a check against my account and handed it to him right there.

Q. (By Mr. Friedman): So somebody forced you to. A. Well, they didn't force me. I should'nt use the word.

But they wouldn't cash it unless I de- [p. 589] posited it to my account and gave him—in short, they wouldn't honor payment on his check even though it was a draft or a cashier's check.

Q. All right. Now let's stop a minute. Mr. Wolcher has a check for $30,000. A. Yes, sir.

Q. And according to your testimony he wants it cashed? A. That's right, sir.

Q. And you and he went to the bank? A. That's right, sir.

Q. Now what happened when you got to the bank? A. Well, Mr. Wolcher wanted this check cashed in thousand dollar bills.

Q. Yes? A. The bank at the time said they didn't have that many thousand dollar bills.

Q. Well, now before the bank said that you must have said something to the bank; Mr. Wolcher didn't know anybody at the bank as far as you know, did he? A. I just handed the check in and I said "Could we have thirty $1,000 bills for this draft?" or cashier's check or whatever it is called.

Q. Had you endorsed it before you handed it in to get it cashed. A. I don't think so. I think we just handed it in. I don't remember that, sir.

Q. Didn't you say, "This is my friend, Mr. Wolcher; he would like to get a check cashed"? A. I wouldn't remember that, sir. I might have.

Q. Well, now, if you were just going there to get [p. 590] a check of this kind cashed, you would have endorsed it before you presented it? A. Well, there was no need for it; it was a draft or a cashier's check or something.

Q. It was made payable to somebody, wasn't it? A. Well, I don't know. I don't remember that.

Q. You don't remember that? A. I don't remember what it was—I don't remember, to recall the surrounding circumstances.

Q. Well, anyway, you had some negotiations with the bank teller about getting thirty $1,000 bills? A. Yes, sir.

Q. The bank told you they didn't have than many on hand or something to that effect? A. That's correct.

Q. What else did he say? A. Well then, he said that they couldn't accept this check immediately because they would still have to clear it.

Q. I see. A. So they said they wanted it deposited to my account, and then he said, "Well, we can let you have ten $1,000 bills and you make out this blank check, fill it out and we will withdraw ten $1,000 bills."

Q. Now this was all at the suggestion of the man at the bank? A. Yes, sir.

Q. You didn't suggest, "We will deposit it to my account and I will give Mr. Wolcher whatever money I have available?" You didn't suggest that? A. I don't think I did, sir.

[p. 591] Q. No. So the bank teller suggested that you deposit it in your account? A. That's correct.

Q. Then what did you do? A. Well then I made out this bank check which is one of their own blanks lying in the bank there, for the $10,000, and we gave them ten $1,000 bills.

Q. Well, now, you drew a check, you have it there before you. Who did you make the check payable to? A. The check is made payable to cash, naturally—being drawn from my account.

Q. Made payable to cash and endorsed by whom? A. It has got to be endorsed by me.

Q. Yes? A. Yes, certainly.

Q. And then you received ten $1,000 bills, or did he hand them to Mr. Wolcher? A. Oh, he handed them to me, naturally, sir.

Q. I see. Then you handed them to Mr. Wolcher? A. Quite so.

Q. Can you think of any reason why at that time, having deposited $30,000 in your own account, that belonged to Mr. Wolcher, you didn't make a check to Mr. Wolcher for $10,000 at that time?" A. I didn't think of that, sir.

He wanted it cashed, he wanted cash and we were interested in helping him get the check cashed.

Q. I see. So you just didn't think of it that way. Well, when did you draw the balance out, of $20,000? A. Well, here it is—about four days later he called me up and met me at the bank and we with-[p. 592]drew the balance of it in thousand dollar bills—twenty $1,000 bills.

Q. Yes? A. And we handed it to Mr. Wolcher.

Q. And when you say "we" withdrew it, how did you withdraw it? A. We had to make a check to $20,000 in cash.

Q. "We," or you? A. I had to do it.

Q. I see. You made a check for $20,000 in cash? A. That's right.

Q. Payable to cash? A. That's right.

Q. You endorsed it? A. Right.

Q. Received $20,000—twenty $1,000 bills? A. That's right.

Q. Again, you didn't suggest that you make the check for $20,000 payable to Mr. Wolcher at that time and then have it cashed while you were there to verify his signature? A. No, sir.

Q. I see. Never dawned on you to do it that way?

Mr. Campbell: Objected to as argumentative, if the Court please. He has stated what he has done.

The Court: The objection will be sustained.

Mr. Friedman: Well, I am trying to find out what he didn't do and why.

Q. All right, what is the next amount of money you received from Mr. Wolcher? A. That is that $30,000 which is deposited to my account here on January—that's not very legible. It is about January 4th I guess.

Q. Yes, and how did you receive that money? A. In cash.

[p. 593] Q. Yes? A. M-hm.

Q. In thousand dollar bills? A. No, it was all sorts of bills.

Q. All sorts of bills? A. Yes, sir.

Q. Big package? A. Big package, yes, sir.

Q. I see. When did you first count it? A. Well, when it came into my office. Q. I see. And you took it to the bank and deposited it? To your account on the fourth of January? A. Yes, sir.

Q. And how long did you keep that money? A. Well, on the 13th there is $7,250 issued, and on the balance here a check for the balance of—what is it, $22,000 something. And it is right here, I imagine, isn't it?

Q. Well, you drew a check for $7,250 on the 13th of January, is that correct? A. Yes, sir, and—

Q. Is that correct? A. And on February 1st we drew one for $22,750 to Advance Automatic Sales Company.

Q. February 1st? A. Yes, sir.

Q. But the one for $7,250, to whom was that drawn? A. Well, that was $5,250 that went to—well, that was cash, I think that is here. I think that's —yes, here it is: it is in cash.

Q. That was to cash? A. Yes, sir.

Q. And when you say to cash, you mean you drew a check payable to cash for $7,250? A. Yes, sir.

[p. 594] Q. What did you do with that $7,250? A. That is the merchandise we bought for which we had that receipt.

Q. Yes? When did you buy this merchandise? A. Well, around that time, I guess.

Q. When did you pay for it? A. Went over and paid for it in cash just about that time.

Q. Didn't pay for it? A. I can't recall all the instance

Q. Didn't you pay for it by check? A. No, we paid for it in cash.

Q. Paid for it— A. We got a receipt for it.

Q. Where did you go to pay for it? A. Went over to Runyon's Sales Company.

Q. That is in New York? A. No; they are in New York now; I think at that time they were in Newark.

Q. Well, you went over to Newark to pay for it in cash, is that right? A. Yes, sir.

Q. And that was $5,000 what? A. $250 or $7,250 merchandise. I don't remember the entire incident, but I know there was $5,250 worth of phonographs.

Q. Well, there is a receipt here somewhere? A. That's right.

Q. Now did you wait until it was your time to go over to Newark to pay for this bill to draw the money out of the bank? [p. 595] A. I don't understand that. I don't understand what you mean.

Q. Well, you withdrew $7,250 out of the bank? A. Yes, sir.

Q. And you went over to Newark and paid the Runyon Sales Company some money? A. Yes, sir.

Q. How long after you drew the money was it that you paid the Runyon Sales Company? A. Oh, I couldn't remember that, sir. I don't remember that, sir.

Q. You don't remember that? A. No, sir.

Q. Well, have you any idea whether it was the same day or the next day or the month afterwards? A. No, I couldn't recollect that, sir.

Q. No recollection at all? A. No. It wasn't the next—I don't remember that, sir.

Q. Well, you drew the money out for the purpose of paying the Runyon Sales Company, isn't that right? A. Yes, sir.

Q. Now the receipt which you have produced here is dated January the 26th, 1944, "Received from Bill Gersh payment in full for ten music machines, shipped to Advance Automatic Sales Company, San Francisco, California, $5,250"? A. That's right.

Q. "Runyon Sales Company," by somebody or other. Is that right? A. Yes, that is; that is what it says there.

Q. So it was thirteen days after you drew the [p. 596] money out of the bank before you made this payment you are talking about? A. That is the—oh, yes, sir, you are right.

Q. What's that? A. That's right, sir.

* * * * * * * * * * *

[p. 601] Q. * * * Now going back to this first $5,000 in June. That was sent to you in cash, was it? A. I wouldn't recollect. I can't recollect whether it was actually in cash or by check. Usually it came to me by cash.

Q. I see. Well, you don't recall whether you got it in cash or by check? A. No, I can't recall exactly.

Q. Did any letter of instruction accompany it? A. Well, they would usually phone us, and always the instructions were—sent it back the way I sent it to you.

Q. Well, now, I am talking about this $5,000, not what he usually did. [p. 602] A. You might have phoned us and told us to send it right back.

Q. And he might not. Well, if he didn't, what did he do? If he didn't phone you, what did he do? A. We sent it back immediately, the same day; so he must have phoned us.

Q. Well, we will get around to sending it back. He sent it to you first, didn't he? A. Yes, sir.

Q. He must have conveyed some information to you as to *when* he was sending you $5,000 for? A. Oh, I didn't understand your question. He wanted us to buy equipment with it.

Q. What kind? A. Coin-operated machines. He was looking for slot machines, consoles, phonographs, various equipment.

Q. And how did he convey that information to you? A. Usually by telephone.

Q. I am talking about this $5,000. A. Yes, sir, this $5,000.

Q. He phoned you about it? A. Probably, yes, sir.

Q. What did he say, "I am sending you $5,000, Bill; send me some machines"? A. Probably said that.

Q. He probably did. Do you know what he said? A. I couldn't recall—1943, these conversations.

Q. I see. But you sent it back to him the same day? A. Yes, sir.

Q. Why? A. Because when we looked around and—he [p. 603] might have phoned me and asked it to come back

the same day. He did that a few times. I think this might have been one of the instances.

Q. You think this is one of the instances? A. It might have been one of the instances when it was received and we received a phone call—had deposited it already and sent it right back to him.

Q. How did you send it back to him? A. In cash, the way he instructed, the way he sent it to us.

Q. What did he say to you about so far as instructing you to send this money back in cash? A. He said, "Send it back the way you received it."

Q. You had already deposited it in your bank? A. Yes, sir, already deposited it.

Q. I see. And how did you send it back to him? I mean, by what mode of conveyance? A. Usually by airmail, the way he sent it to us.

Q. Airmail, registered? A. Might have registered it; I don't remember, sir. I usually didn't.

Q. You don't remember? A. We would send it airmail special delivery.

Q. Just put the currency in an envelope and mail it back to him? A. Yes, sir.

Q. Send any letter along with it? A. I wouldn't recall, sir.

Q. You had deposited it in your bank. Did you ask them for any receipt to show you had got it back again, that you had sent it back again? [p. 604] A. No, sir.

Q. Now the second payment, $5,000—No, $3,300, is that right? A. That's right.

Q. How did you receive that, by check or by cash? A. I think we received that in cash, too, sir.

Q. Yes, any instructions accompany that? A. I wouldn't recall, sir. I wouldn't be able to recall that.

Q. What did you get it for? A. Well, usually—Oh, you mean any instructions that came? Usually he would tell us in advance. I think there was some type of equipment he wanted that amounted to that money, amounted to that

much money, because we deposited—we couldn't obtain it, and we sent it back to him on the next day.

Q. Well, where did you try to find this equipment? A. Oh, we would usually call around or walk down on Tenth Avenue in New York and ask various jobbers if they had it, or maybe we would make some phone calls around to various different cities.

Q. Maybe; do you? A. We usually did, sir.

Q. I see. Well then, within the course of a business day you knew you couldn't get what he wanted, is that right? A. Yes, sir.

Q. And you sent him back the money? A. Yes, sir.

Q. The $3,300? A. Yes, sir.

[p. 605] Q. Are you sure of that? A. Yes, sir, it is marked here, sent it right back.

Q. Where is it marked? A. Oh, I mean, we withdrew the cash and sent it back to him.

Q. I see. A. Every penny he ever sent us.

Q. Every penny he ever sent you. So you withdrew this $3,300 and sent it back to him? A. Yes, sir.

Q. Now the next amount was $5,000. How did you receive that? A. I wouldn't recall. Probably received—might have received it in cash or might have received it by check. Probably—I wouldn't recall that now. I can't recall how it was received. Usually most of the money he sent us was cash.

Q. I see. What instances can you recall when he sent you cash? A. The only thing I recall here is when he came in with his $30,000 check to have it cashed by us. That was the draft or cashier's check.

Q. All right, $5,000 on August 31st? A. Yes.

Q. You say you got $5,000. You think it was cash? A. Yes.

Q. What instructions did you get as to that? A. I made him a sale. He might have been in town, for all I know.

Q. Listen to my questions, Mr. Gersh. What [p. 606] instructions accompanied the $5,000 from Mr. Wolcher? A. I wouldn't recall that now. I can't recall those. That

is in the past. Probably he sent me the money like he always did to buy something with it.

Q. Yes. A. And probably he wanted me to buy some merchandise of some kind, and if I didn't buy it, I gave him back his check, that's all, gave him back his money.

Q. When? A. It is marked here on August 31st. I made a check to him.

Q. August 31st? A. Yes, sir.

Q. You sent that back by check? A. He might have been in town. He might have picked this up in town.

Q. You don't know? A. I wouldn't be positive, sir. I can't remember all the times he was in New York.

Q. At least we have a check made out to Mr. Wolcher now? A. Yes, sir.

Q. All right. What is the next amount you received. A. That is—

Q. $12,500? A. Yes, sir.

Q. Right ? A. I can check it up right here.

Q. October 2nd? A. Yes.

Q. How did you receive that money? A. Cash, sir.

[p. 607] Q. Cash? What makes you so positive that was cash. A. Because I remember most of those transactions were in cash. He sent me, always sent me cash, and I think this was one of those that came in cash. The amount sounds that way to me.

Q. You don't recall receiving the $12,500 check? A. I wouldn't—no, I wouldn't recall definitely on the check, sir.

Q. I show you this photostat. A. Very well. That's right.

Q. Do you recall seeing the original of that? A. Possibly, yes.

Q. Look on the check, on the back of it, and see if you recognize the endorsement? A. Yes.

Q. Whose endorsement is on it? A. That is my endorsement, "Bill Gersh," that's right.

Q. So you received the $12,500 by check? A. That's right.

Q. Is that right? A. That is right.

Q. How long did you keep it? A. Oh, about a week or so, wasn't it? I don't remember.

Q. Well, you deposited it on the 2nd and withdrew it on the 10th?

Mr. Campbell: 13th.

A. 13th.

Q. (By Mr. Friedman): 13th? A. Yes, sir.

Q. What did you try to do for that check in the meantime? [p. 608] A. Well, I don't recall now, but I know we did dig for equipment at that time. We were looking for some equipment.

Q. You have no recollection what you were trying to find for as large a sum as $12,000? A. No, sir.

Q. And evidently you didn't find it? A. No.

Q. You sent the money back? A. Yes.

Q. How? A. By cash.

Q. How did you send back this $12,500? By airmail, or just ordinary mail, or how? A. Probably either way. Airmail, I imagine.

Q. You imagine it went airmail? A. Yes.

Q. Did you have a conversation with Mr. Wolcher about the return of this money? A. I think so.

Q. When did that take place? A. I can't remember that. He used to 'phone us and tell us to send it back. "Did you get anything? No? Well, send the money back," and I would send the money back.

Q. You would send it back to him? A. Yes.

Q. And having sent back this $12,500, you didn't receive any more money, according to your testimony, from October to January, when you got this $30,000? A. Not that I recall. That is all I have here.

Q. Is that right? A. That is what I think, sir.

[p. 609] Q. And on January 26th you made this purchase from the Runyon Company. A. Yes, sir.

Q. So am I correct, then, in stating that from the time Mr. Wolcher sent the $5,000 on January 15th in 1943, and then $3,300 in August, and then $5,000 in August, and then $12,500 in October, and then $30,000 on January 4th, you

didn't purchase one piece of equipment for him, one coin machine for him, until the 26th of January, 1944; is that correct? A. That is right.

* * * * * * * * * *

[p. 613] Q. Do you recall of giving a statement at the office of the Intelligence Unit of the Bureau of Internal Revenue, 253 Broadway, New York, New York, on March 16th, 1949? A. Yes, sir, they did call me in. I don't remember the exact date.

Q. No. Do you recall that Mr. Appling, the gentleman sitting here, questioned you back in New York? A. Yes.

Q. You recall that? A. Yes, sir.

Q. I will ask you whether or not at that time and place the following question was not asked you, to which you gave the following reply:

"Q. According to your previous statement here, that $30,000 was accounted for by $5,250 being spent by you for juke boxes for Mr. Wolcher and $2,000 went in the form of cash for awhile for the purchase of spare parts, $2,000 was converted to a cashier's check at the West Side Trust Company, Newark, New Jersey, and mailed to Wolcher; is that correct?

"A. That must be correct."

[p. 614] Mr. Campbell: At this time may I see the transcript from which counsel is purportedly reading, if the Court please?

Mr. Friedman: You may, but may I ask in return that, have you got the original of this?

Mr. Campbell: I don't know.

Mr. Friedman: The Treasury Department sent you a lot of files. It ought to be in there somewhere. (Handing document to Mr. Campbell.)

Q. (By Mr. Friedman): Did you so testify? A. I probably did, sir, if it is there.

Q. Have you any recollection of so testifying? A. Well, I recollect testifying before those people.

* * * * * * * * * *

[p. 629] Recross-Examination

By Mr. Friedman:

Now, Mr. Gersh, in this statement which is now Government's Exhibit No. 40 for identification, which is a statement given by you to Special Agent Mr. Vincent J. Aquino on September—on August 31, 1944, in New York, I will ask you whether the following questions were not asked of you to which you gave the following replies:

"Question: Mr. Gersh, I have examined both your Cash Box account at the Corn Exchange Bank and also the Cash Box cash receipts and disbursements book, together with cancelled checks and check stubs, and in these records I find that you deposited the following. We will take the disposition and explanation for each as we go along. On June 15, 1943, the records [p. 630] show a deposit of $5,000. Would you please state from whom that $5,000 was obtained?

"Answer: That was from Mr. Louis E. Wolcher.

"Question: Do you recall whether that money was given to you in cash?

"Answer: I believe that money was sent to me in cash.

"Question: By the medium of what?

"Answer: I think, if I remember correctly, just a plain envelope.

"Question: By mail?

"Answer: By mail.

"Question: Do you recall whether it was registered or insured or anything of that nature?

"Answer: No, I don't. That's due to my opening so much mail every day.

"Question: This $5,000 was given you by Wolcher for the purpose of your buying for him certain machines?

"Answer: That's right.

"Question: On the same day you issued a check on the Cash Box payable to the order of Cash for $5,000; do you recall what you did with that cash?

"Answer: Yes, I purposely deposited that money so that there would be a record of it, that I had received it and all that. And I withdrew the cash, held it with me for awhile and then returned it to him, because we used to talk [p. 631] long distance. He would call me—he is a famous long distance talker—and after he would call me, I would say, 'Lou, I have this cash. Now I haven't been able to do anything with it. Haven't been able to get a real buy. What do you want me to do?' He'd say, 'Just send the cash right back.' I would say, 'All right, if that is the way you want it, you are taking the chance.'

"Question: How would you send this cash back?"

Mr. Campbell: Just a moment. I am going to make an objection—

Q. (By Mr. Friedman) (Continuing):

"Answer: I would put it in an airmail special delivery envelope—"

Mr. Campbell: Pardon me just a moment. I am going to make an objection at this point to a very long, compound question, apparently consisting of many questions and answers.

* * * * * * * * * *

[p. 634] The Court: However, I will allow the jury to determine whether there is a conflict; in the interest of time, we will proceed. You may read it.

Mr. Friedman: Yes.

Q. (By Mr. Friedman): Well, I will ask you if those questions were asked of you, to which you gave the replies as set forth in those statements? A. They probably were, sir.

Q. You mean if they are in here, that is what you said? A. They probably were exactly what I said.

Mr. Friedman: Very well. I offer in evidence the part I have just read.

Mr. Campbell: I offer in evidence the entire document.

Mr. Friedman: I have no objection whatsoever.

Mr. Campbell: Very well.

The Court: Let the document be entered, admitted next in order.

The Clerk: Government's Exhibit No. 40 received and filed in evidence.

[p. 635] (Whereupon Government's Exhibit No. 40 for identification only was received in evidence.)

Mr. Friedman: There are two copies here. You are just offering the first eleven or so pages, is that right?

Mr. Campbell: That's right.

Mr. Friedman: All right. Thank you.

Mr. Campbell: You are welcome.

Q. (By Mr. Friedman): Now I will ask you, calling your attention to this question:

"Question: On August 12—"; which is now Government's Exhibit 40.

Mr. Friedman: Is that right?

The Clerk: Yes.

Q. (By Mr. Friedman): No. 40.

"Question: On August 12th, 1943, you issued a check to cash, pulling out that $3,300 that we just spoke about. What happened to that money?

"Answer: I believe that at that time I was making a trip somewhere around here in the east. I don't recall my trips. And I thought I could use that money to buy some phonographs for Mr. Wolcher. Not being able to, I think we were instructed by him to just return the money, and I believe that we phoned him or I phoned him, rather, and asked him what he wanted me to do, that I couldn't do any good [p. 636] for him, and he said, 'just send it back to me,' or as close thereto as the wording I remember."

Mr. Campbell: Objected to as not being an impeaching question.

Q. Did you take a trip with this $3,300 and attempt to buy phonographs? A. No, sir I don't think that is the way it sounds to me. I think I meant I took trips and I saw opportunities to buy. I don't say I took it with that $3,300, sir.

Q. I see. That is your explanation? A. That is the way it sounds to me.

* * * * * * * * * *

AUG 13 1956
JOHN T. FEY, Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 253

LOUIS E. WOLCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 7a; No. 14,919, R. 77)[1] was entered on May 15, 1956, and a petition for rehearing was denied on June 15, 1956 (No. 14,919, R. 78). The petition for a writ of certiorari was filed on July 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The record of petitioner's second trial is designated "R." The record of proceedings on petitioner's motion for a new trial, which gives rise to the present petition, is designated "No. 14,919, R."

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion for a new trial on the ground of newly discovered evidence.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure.

RULE 33. NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new

judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On October 4, 1950, petitioner was indicted in the United States District Court for the Northern District of California, Southern Division, for wilful attempted evasion of $30,276.06 of his individual income taxes for the fiscal year ended June 30, 1944. (R. 3-4.) After a jury trial held in April and May, 1951, petitioner was convicted, but the Court of Appeals reversed for errors in the admission and exclusion of evidence. *Wolcher* v. *United States*, 200 F. 2d 493 (C. A. 9th). After a second jury trial, lasting approximately five days, petitioner was again convicted. (R. 6.) On September 4, 1953, he was sentenced to imprisonment for two years and fined $10,000. (R. 18–20.) The Court of Appeals affirmed, *Wolcher* v. *United States*, 218 F. 2d 505, and this Court denied certiorari, 350 U. S. 822. On September 2, 1955, petitioner filed a motion for a new trial on the ground of newly-discovered evidence. (No. 14,919, R. 3–12.)

The facts leading to petitioner's conviction are set out rather fully in the Government's brief in opposi-

tion to the first petition for certiorari (No. 77, October Term, 1955, pp. 3–9) and may be summarized briefly here:

During 1943 petitioner purchased 5,138 cases of liquor for his own account from licensed San Francisco wholesale distributors. All but 500 cases originated with out-of-state suppliers. (R. 347–353.) According to the distributors' records and the testimony of their representatives, petitioner paid the applicable O. P. A. ceiling prices for this whiskey. (R. 46, 56–57, 62, 95–97, 106, 120–122.) About 1,500 cases were resold by petitioner to bars and taverns in which he or his relatives had a proprietary interest. He sold the remaining 3,638 cases at wholesale at prices ranging from $20 to $30 per case above O. P. A. ceiling prices, the over-ceiling portion being received in currency. (R. 158–159, 164, 174–175, 179–180, 184–187, 202–206, 223–227, 247–250, 263–288, 347–348, 411, 422, 428, 436.) None of these wholesale transactions appeared on petitioner's books or income tax return. (R. 326, 328, 366.)

Petitioner testified that he had not recorded the wholesale transactions on his books because he did not want to get into trouble with the O. P. A. (R. 366, 405, 406) and had not reported them on his income tax return because his profits were approximately offset by some $115,000 which he had paid to one William Gersh, who was instrumental in securing the whiskey (then a scarce commodity) for him. (R. 353–369, 381, 409–411.) Petitioner introduced documentary proof that he had made a net transfer of $12,500 to Gersh during the pertinent period (R. 370-

384), and claimed that he had also sent or given Gersh additional funds, approximately $100,000, in currency (R. 358–361, 369, 379, 399.) Gersh (who had testified for the Government as a rebuttal witness at the first trial) was not called as a witness by either side at the second trial.

Petitioner's motion for a new trial, so far as here pertinent, was based upon an affidavit of one Edwin Corriston dated July 30, 1955, to the effect that in 1943 Gersh told him that petitioner was having difficulty in getting whiskey and had sent him (Gersh) cash for making over-ceiling payments for whiskey obtainable in the East; that Corriston suggested Gersh get in touch with a whiskey dealer named Frank Mayer; that some months later Gersh told Corriston that because Mayer had run out of whiskey he would like to have the names of other possible suppliers, whereupon Corriston recommended Garry Taylor and Hymie Carlin; that Corriston then arranged a meeting between himself, Gersh and Taylor, at which Taylor demanded a $10,000 down payment; that Gersh handed Taylor an envelope saying that it contained "ten big ones"; and that shortly thereafter Gersh thanked Corriston for the contact with Taylor and said that everything looked good. (No. 14,919, R. 13–16.)

The judge who had presided at petitioner's trial heard and denied this motion for a new trial on alleged newly-discovered evidence. (No. 14,919, R. 26.) The Court of Appeals unanimously affirmed, holding (1) that the proposed new evidence would be inadmissible as hearsay and (2) that this evidence would, in any

event, be unlikely to produce any result different from the finding of petitioner's guilt reached by two juries. (Pet. 1a–7a.)

ARGUMENT

The findings of trial courts on motions for new trial based on newly-discovered evidence should remain undisturbed except for most extraordinary circumstances. *United States* v. *Johnson*, 327 U. S. 106, 111. This is especially true where, as here, the judge who presided at the trial passes on the motion for new trial. *Id.* at 112; *Harrison* v. *United States*, 191 F. 2d 874, 876 (C. A. 5). It is well settled that before the motion may be granted five factors must ordinarily be present: (1) the evidence must have been discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) it must be material; and (5) it must be such that on a new trial it would probably produce an acquittal. *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. A. 8); *Evans* v. *United States*, 122 F. 2d 461, 468–469 (C. A. 10), certiorari denied, 314 U. S. 698; *Brandon* v. *United States*, 190 F. 2d 175, 178 (C. A. 9); *Thompson* v. *United States*, 188 F. 2d 652, 653 (C. A. D. C.).

In the light of these familiar principles, it is clear that the two courts below were correct in rejecting petitioner's motion. For, as the Court of Appeals held, the proposed new evidence was plainly hearsay, outside any exceptions to the hearsay rule, and would have been insufficient, even if admissible, to warrant an-

other new trial. This conclusion, keyed to the particular facts of this case, presents neither a conflict nor any problem of general importance warranting review by this Court.

1. The matters set forth in Corriston's affidavit (No. 14,919, R. 13–17), on which petitioner stakes his case, are the clearest kind of inadmissible hearsay, consisting almost entirely of things Corriston says Gersh told him. True, Corriston does say that as a result of conversations he had with Gersh and Taylor, he arranged a meeting between them at which he saw Gersh hand Taylor an envelope apparently containing $10,000 in cash. But there is nothing to connect this with petitioner except Gersh's alleged oral statements—hearsay—to Corriston.

In an effort to surmount the hearsay objection, petitioner argues (Pet. 16–25) that "[m]ost of Corriston's testimony" would have been admissible because, if petitioner is to be believed, he and Gersh were co-conspirators in a scheme to violate O. P. A. regulations and therefore Gersh's declarations were competent as those of a co-conspirator. To this petitioner adds that the hearsay statements of Gersh to which Corriston would have testified were part of an amorphous "*res gestae*" and would have been admissible on this score. These arguments are unsubstantial, as is petitioner's claim of inconsistency between the decision below and the decisions in *St. Clair* v. *United States*, 154 U. S. 134, and *Aetna Insurance Co.* v. *Licking Valley Co.*, 19 F. 2d 177 (C. A. 6).

a. Declarations by a co-conspirator stand on the same footing as those of the party himself. They may, therefore, be received against, but not for, the party. 4 Wigmore, *Evidence* (3d ed.), Secs. 1069, 1079. Cf. *Lutwak* v. *United States,* 344 U. S. 604, 617; *Clune* v. *United States,* 159 U. S. 590, 593. A party's testimonial utterances violate the hearsay rule if offered for him (since there is nothing especially trustworthy about a self-serving statement) but not when offered against him, because he obviously cannot complain of lack of opportunity to cross-examine himself. 4 Wigmore, *Evidence* (3d ed.), Sec. 1048. There is nothing inconsistent with these familiar rules in *St. Clair* v. *United States, supra,* for the declarations there involved were received *against* the co-defendants, not in their favor. Clearly, Gersh's alleged statements to Corriston do not become competent evidence for petitioner on the theory that he and Gersh were co-conspirators.

b. Petitioner's references to a *res gestae* of which Gersh's statements are said to have been a part add nothing to the effort to cure the hearsay vice. The alleged utterances, in the situation to which they relate, have none of the elements of unrehearsed spontaneity which would warrant their acceptance under the *res gestae* exception to the hearsay rule. Petitioner's claim of a conflict between this conclusion of the courts below in the instant case and the decision in *Aetna Insurance Co.* v. *Licking Valley Co.,* 19 F. 2d 177 (C. A. 6), is wide of the mark. For the facts

of the two cases are wholly dissimilar,[2] and the application of the broad principle in question "depends entirely on the circumstances of each case." 6 Wigmore, *Evidence* (3d ed.), Sec. 1750, p. 144, citing, *inter alia*, the *Aetna* case; *Pietrzak* v. *United States*, 188 F. 2d 418, 420 (C. A. 5th), certiorari denied, 342 U. S. 824. *Cf. Guthrie* v. *United States*, 207 F. 2d 19, 22–23 (C. A. D. C.).

2. Even if Corriston's testimony were admissible it is not such, when viewed against the factual background of this case, that it would probably produce an acquittal. The evidence showed conclusively that petitioner had sold some 3,638 cases of whiskey at wholesale at prices far in excess of the O. P. A. ceiling prices he had paid the distributors for its acquisition; that petitioner received the excess in currency and kept no record of it; and that there was no indication

[2] The issue in the *Aetna* case was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna Company. Plaintiff's manager testified that in his presence Bennett, who represented plaintiff, telephoned Aetna's agent, and that "after the conversation over the phone, he [Bennett] told me the insurance was in effect." (19 F. 2d at 178.) The court, after pointing out that no objection to the testimony appeared in the record, went on to say that it was "disposed to think that the statement was admissible as part of the *res gestae*" because it was made at the close of the telephone conversation. 19 F. 2d at 179. It seems clear that the rationale of the holding is that, in the particular circumstances of that case, Bennett's statement was a spontaneous utterance. See *Wicker* v. *Scott*, 29 F. 2d 807, 809 (C. A. 6).

on his income tax return that he was engaged in any such transactions. *Supra,* p. 4. Petitioner's defense was that he made no profits at all on his wholesale dealings because they were offset by the $115,000 he allegedly paid to Gersh (R. 366, 381, 409–410). He testified that he had never even intended to make a profit (R. 444–445). The Government's proof did not foreclose the possibility that petitioner might have found it necessary to pay some black market premiums to Gersh (R. 405–406) or to others (R. 335–337) in order to get the whiskey. But the issue was not whether petitioner had paid *some* cash premiums, but whether he had wilfully attempted to evade and defeat a substantial part of his income tax. On that issue the evidence was overwhelming, and we cannot conceive that Corriston's testimony (*supra,* p. 5) would have changed the result. The closing sentences of the Court of Appeals' opinion aptly summarize the matter as follows (Pet. 6a–7a):

> Two juries failed to credit appellant's implausible story wherein he pictures himself as a "good fellow" daily running the risk of fine and imprisonment in illegally receiving some $200,000 without any of it "sticking to his fingers", his assertion that he did so in order to obtain liquor for his own taverns, notwithstanding.
>
> The exercise of a sound discretion would dictate that no different result would be reached at a new trial.

Because the proffered testimony of Corriston was plainly not such that it would probably produce an acquittal, petitioner's motion for a new trial was

properly denied. *Nilva* v. *United States*, 212 F. 2d 115, 124 (C. A. 8), certiorari denied, 348 U. S. 825; *Heald* v. *United States*, 175 F. 2d 878, 883 (C. A. 10), certiorari denied, 338 U. S. 859; *Goodman* v. *United States*, 97 F. 2d 197, 199 (C. A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1956.

U. S. GOVERNMENT PRINTING OFFICE : 1956

FILED
AUG 24 1956
JOHN T. FEY, Clerk

No. 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I

The opinion below is in square conflict with *Aetna Insurance Co.* v. *Licking Valley*, 19 F. 2d 177 (6th Cir.). In the *Aetna* case the court held admissible extrajudicial statements (a) made in the course of a business transaction, (b) material on the assumption that the statements made were true and (c) offered in favor of the declarant's principal or colleague.

The Government's brief virtually concedes the conflict of circuits. The Government seeks to distinguish the *Aetna Insurance* case on the facts. But in *Aetna* the court specifically refused to limit the res gestae doctrine to any narrow definition of spontaneous exlamations. The court followed the doctrine laid down in Wharton on Evidence and in *St. Clair* v. *United States*, 154 U.S. 134, 149, that the res gestae include statements "in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself."

In both the *Aetna* case and the present case the statements were made in the course of pertinent business transactions—there, solicitation and agreement for an insurance policy; here solicitation and agreement for black market whiskey purchases. It is immaterial that in the *Aetna* case the business transactions were lawful and, in the present case, unlawful.

Gersh's statements are no less closely related to the business transactions in issue, no less unpremeditated, and no less spontaneous, than Bennett's statements in the *Aetna* case. They were both in immediate causal relation to the business transactions, a relation not broken by an individual wariness seeking to manufacture evidence.

Gersh's statements can not in any way be challenged as self-seeking when made, or as involving a deliberate manufacture of evidence. If anything these statements when made had the effect of implicating rather than exculpating Gersh. His statements of the past are certainly more reliable than his present testimony denying black market involvement.

The court below took direct issue with the principle followed in the *Aetna* case by saying that such statements could not be received in favor of a principal or coconspirator of the declarant. There is a patent conflict which should be resolved by this Court.

—II—

If anything this case is clearer for admissibility than *Aetna*. The mere fact that Gersh made the statements attributed to him established the fact, denied by Gersh at the first trial and denied by the prosecutor at the second trial, that Gersh was engaged in whiskey black market activities. This was vitally material to petitioner's defense. That was wholly overlooked or ignored by the court of appeals below.

The Government claims (Brief 10) that even assuming petitioner paid some black market whiskey bonuses to Gersh, there was "overwhelming" evidence that he attempted to evade some income taxes.

On the contrary. "If [Corriston's] evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case." (Mr. Justice Douglas' opinion on bail, Pet. Appx. p. 10a.)

The bare sentence in the Government's brief is made without any analysis or any refutation of petitioner's analysis of the evidence.

1. How was the conviction obtained from the jury? On the basis that there was nothing whatever to connect Gersh with whiskey transactions (R. 14919, p. 8), and that it would be fantastic to credit petitioner's account of sending large sums of cash to Gersh for black market whiskey bonuses. That is how the prose-

cution's case was summarized in the charge of the trial judge (R. 14109, p. 483):

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts of cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."

The second jury responded with a conviction. It recommended leniency. This recommendation is the more striking since the jury was unaware that at the first trial Gersh had admitted handling $85,000 from petitioner,—including $38,300 in cash in three shipments, two by mail and one by express. (Pet. p. 11.) Gersh was compelled to admit these receipts because they were established by his bank records. But Gersh denied any involvement in whiskey black market purchases. He testified he obtained this money from petitioner to buy coin machines. The trial judge excluded petitioner's evidence to impeach Gersh's coin machine explanation. The court of appeals reversed this exclusion: the evidence was material to determine whether petitioner or Gersh was telling the truth as to why the money was paid to Gersh.

At the second trial, instead of broadening inquiry into the facts the Government released Gersh from subpena. As soon as petitioner learned that Gersh was nevertheless in San Francisco, after the case was closed but before argument to the jury, defense counsel sought leave to call Gersh to identify the bank records. The Government objected and defense application was denied.

It is not the interest of justice, but the scoreboard of convictions, that accounts for the Government's blocking the fullest inquiry into the facts.

The Government's conviction was obtained by deriding petitioner's testimony of his cash shipments of black market whiskey overages to Gersh as a cock and bull story invented for purposes of trial.

Unsupported, petitioner's account may not have been persuasive. But a very different complexion would be put on the case at a new trial. Petitioner's account would be corroborated not only by Gersh's own admission of substantial cash receipts and substantiating bank records, as at the first trial, but Corriston's testimony would supply the vital missing link by corroborating petitioner's testimony as to Gersh's whiskey black market activities.

2. As to the amounts paid by petitioner to Gersh, the critical difference between the testimony of petitioner and Gersh concerned the transaction in November, 1943. Petitioner testified that at that time he personally delivered $60,000 to Gersh—$30,000 by draft, and $30,000 in cash. Gersh claimed that he handled the $30,000 bank draft only to cash same for petitioner, and denied receipt of the other $30,000 cash. (Pet. p. 11.)

Petitioner's testimony as to this November payment, together with the amounts admittedly received by Gersh, establish payments to Gersh of 95 percent of the amount of black market receipts to be accounted for by petitioner.

Corriston's newly discovered evidence corroborates petitioner's version of the November payment to

Gersh. It establishes not only the $10,000 cash which Gersh paid to Taylor at the luncheon meeting, held later in November or December, but is circumstantial evidence as to the balance of approximately $50,000 arranged by Gersh and Taylor at that meeting. As a result of that luncheon meeting 2,138 cases of Old Boston Rocking Chair whiskey was shipped to petitioner. Petitioner testified he paid Gersh $25 a case (or $53,450 for this shipment). The Government brief blandly overlooks the fact that at the luncheon meeting there was not only a $10,000 cash deposit but an agreement that the balance of the $50,000 bonus would be paid upon shipment. But this evidence is admissible and material and cannot be shut out of consideration. Corriston corroborates petitioner's testimony that he delivered $60,000 to Gersh in November 1943.

3. The Government refers to the fact that the motion for new trial was denied by the district judge who presided over the trial. But the district judge made no finding or analysis as to the facts. His ruling was that there was no "legal basis" for granting the new trial. The district judge accepted the Government's argument that Corriston's testimony was legally inadmissible.

As to the closing passage of the opinion of the court of appeals, the Government's brief tacitly admits—because it can not fairly deny—the point made in the petition that the court incorrectly recalled the facts of the case and failed to take into account the effect of the total evidence which would for the first time be available to corroborate petitioner's testimony at the new trial. The court's opinion was not based on fact

findings or analysis by the district judge, but consisted of erroneous speculations as to possible facts which if they existed would have supported the order. The court departed from its proper appellate province and from the course of justice to petitioner.

a. Basically the court of appeals rested its conclusions as to the facts on a scornful rejection of petitioner's supposed defense that he made no profits whatever as a result of the black market activities. But that was not petitioner's testimony. His point was and is that he made substantial profits but they were realized at the retail (tavern) level. At the wholesale level petitioner's black market profits were absorbed by what would otherwise have been losses on his resales at ceiling to the Wolcher taverns. The profits of the Wolcher taverns were substantially increased thereby, at the retail level. But the income tax returns for the Wolcher taverns were all true and correct. Petitioner violated the OPA but not the income tax laws.

b. The factual misapprehension of the court of appeals is shown by its statement that petitioner would be corroborated "as to the disposition of but a portion of the black market money admittedly received, leaving a large amount unaccounted for except by appellant's testimony."

(1) Petitioner's black market receipts were not $200,000 as stated by the court of appeals. The amount established was $88,853.71 on the Eastern whiskey, and $95,000 in all—and even that rested primarily on petitioner's admissions. (Pet. p. 5.)

(2) Corriston's newly discovered testimony is evidence of the entire $50,000 payment agreed to for the

last whiskey shipment, not merely the $10,000 cash deposit paid. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892). This evidence corroborates petitioner's testimony that he personally delivered $30,000 in cash to Gersh in November 1943, in addition to a $30,000 bank draft, as contrasted with Gersh's version that he never received such cash. This is in addition to the $85,000 admittedly handled by Gersh according to Gersh's testimony and the bank records. There is corroboration not as to a mere "portion" but rather as to 95 percent of petitioner's black market receipts to be accounted for.

CONCLUSION

Petitioner paid taxes on $66,950 income. He admits substantial profits from his black market activities but points out that these were at the retail (tavern) level—not the wholesale level. There is no claim of tax understatement by the Wolcher taverns.

At a new trial petitioner's testimony would be corroborated as to all but minor aspects.

If the newly discovered evidence is admissible, it is substantial in the perspective of the case and warrants a new trial.

The ruling that the newly discovered evidence is inadmissible warrants review by this Court.

Respectfully submitted,

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August 24, 1956